Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

SPANG & COMPANY, *et al.*,

Petitioners,

v.

JEAN E. BRYTUS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an employee benefit plan is embodied in a collective bargaining agreement that contains no provision regarding amendment, but the collective bargaining agreement terminates and the collective bargaining relationship ends due to plant closing, is the employer prevented by the Employee Retirement Income Security Act from amending the plan, with the result that the collective bargaining agreement continues to govern in perpetuity, contrary to the National Labor Relations Act?

PARTIES TO THE PROCEEDING

The parties are Spang & Company and the Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant, Petitioners; and Jean E. Brytus, John Lazor, Wheat Giacobbe, John Stanko, Steve Kotyk, Alex Warcholak, John Kotyk, Sam Borielle, Jr., and Edward J. Golonka, Respondents (on behalf of themselves and others similarly situated).

Pursuant to Rule 29.6, petitioners state that the only corporation among petitioners and respondents is Spang & Company, which has no parent company nor any subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS AS TO THE AMENDABILITY OF AN EMPLOYEE BENEFIT PLAN, EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT, AFTER THE COLLECTIVE BARGAINING AGREEMENT TERMINATES AND FURTHER CONFLICTS WITH THIS COURT'S JURISPRUDENCE UNDER THE NLRA 12

II. BY MISAPPLYING THIS COURT'S DECISION IN *CURTISS-WRIGHT CORP. V. SCHOONEJONGEN*, THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF CONFLICT BETWEEN ERISA AND THE NLRA AND CREATES AN INTOLERABLE BURDEN ON COLLECTIVELY BARGAINED EMPLOYEE BENEFIT PLANS 19

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Adcox v. Teledyne, Inc., 21 F.3d 1381 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994) 14, 15, 17

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) 19

Anderson v. Alpha Portland Industries, Inc., 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) 17, 18

Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. 1223 (1995) 10, 11, 19, 20, 22, 25

Heussner v. National Gypsum Co., 887 F.2d 672 (6th Cir. 1989) 15, 17

Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete, 484 U.S. 539 (1988) 13, 24

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 12, 18

Lockheed Corp. v. Spink, cert. granted, 116 S.Ct. 806 (1996) 25

Merk v. Jewel Cos., Inc., 848 F.2d 761 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988) 18

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 24

NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939) 23

Nobers v. Crucible Inc. 1975 Salaried Retirement Plan, 925 F.2d 418, 13 Emp. Ben. Cas. (BNA) 2741 (3d Cir. 1991) 16

Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977) 18

TABLE OF AUTHORITIES – Continued

Page

UMW Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982) 24

Walsh v. Great Atlantic & Pacific Tea Co., 96 F.R.D. 632 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983) 16

STATUTES

Employee Retirement Income Security Act of 1974, as amended

Sections 3(1), -(2) and -(3), 29 U.S.C. §§ 1002(1), -(2) and -(3) 13

Section 203, 29 U.S.C. § 1053 13

Section 402(b)(3), 29 U.S.C. § 1102(b)(3) 19

Section 502(d)(1), 29 U.S.C. § 1132(d)(1) 5

Section 502(e)(2), 29 U.S.C. § 1132(e)(2) 26

Section 514(d), 29 U.S.C. § 1144(d) 3, 22

Section 4041(a)(1), 29 U.S.C. § 1341(a)(1) 5

29 C.F.R. § 2617.6(a) 6

ADMINISTRATIVE INTERPRETATIONS

Pension Benefit Guaranty Corporation

Opinion Letter 85-10 16

Opinion Letter 89-01 16

Treas. Reg. § 1.401-2(b)(1) 16

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

S. Bruce, *Pension Claims: Rights and Obligations* (BNA Books, 2d ed. 1993) 18

1A A. Corbin, *Corbin on Contracts* § 186 (1963) 21

Restatement (Second) of Contracts § 89(a) (1979) 21

U.S. Department of Labor, *Abstract of 1992 Form 5500 Annual Reports* (1996) 24

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the court of appeals affirming the district court orders is reprinted in the Appendix at 1a. The report and recommendation of the Magistrate Judge as to liability is reprinted in the Appendix hereto at 4a and as to remedy at 35a. The order of the district court adopting the report and recommendation of the Magistrate Judge as to liability is reprinted in the Appendix hereto at 26a and as to remedy at 51a. The denial of rehearing in the court of appeals is reprinted in the Appendix at 56a. None of the decisions are reported.

JURISDICTION

The order of the court of appeals was filed on February 7, 1996. A timely petition for rehearing was denied on March 5, 1996. This petition is being timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer –
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the NLRA provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement . . . *Provided*, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . .

Section 402(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102(b), provides in pertinent part:

> Every employee benefit plan shall –
>
> * * *

> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

Section 514(d) of ERISA, 29 U.S.C. § 1144(d), provides:

> Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

STATEMENT OF THE CASE

1. This case involves the interrelationship of collectively bargained pension agreements (subject to federal labor law) and the pension plan resulting therefrom (subject to ERISA). From approximately 1896 to 1963, a corporation then known as Fort Pitt Bridge Works (the "Employer") operated two steel fabricating plants in Canonsburg, Pennsylvania, known as Fort Pitt Bridge and Electric Weld. The bargaining unit employees came to be represented by the United Steelworkers of America, AFL-CIO-CLC (the "Union"), though there were separate local unions and separate collective bargaining agreements for each plant.

In about 1950, the Employer entered into separate pension agreements for each plant requiring the Employer to provide defined benefit pensions as specified therein. Neither of the pension agreements prohibited return of surplus assets to the Employer. In order to fulfill its obligations under the two pension agreements,

the Employer adopted a pension plan providing the specified defined benefit pensions to the bargaining unit employees and further providing that, upon termination of the plan, any surplus remaining after satisfaction of all liabilities for all pension benefits under the plan would be returned to the Employer.

In 1963, petitioner Spang & Company bought all of the stock of the Employer.[1] Thereafter, from 1963 to 1978, the Employer entered into a series of three-year pension agreements for each plant that, for the first time, provided that contributions made by the Employer under those agreements could not revert to the Employer. The Employer amended its pension plan to conform to the new pension agreements. The latest in that series of pension agreements were the 1978 pension agreements, which were scheduled to terminate, by their own terms, on September 30, 1981 (the "1978 Pension Agreements").

During the late 1970's and continuing into the early 1980's, the Employer, like much of the domestic steel industry, suffered the effects of poor economic and business conditions resulting from foreign imports. Consequently, although Spang had been successful in reviving the Employer and providing jobs for 18 years, it reluctantly closed the Fort Pitt Bridge and Electric Weld plants on September 30, 1981 – the same day that the pension agreements terminated. On that same date, the Employer delivered to the Union an amended and restated pension

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[1] The corporation formerly known as Fort Pitt Bridge Works was ultimately merged into petitioner Spang & Company. For simplicity, we will continue to refer to the employing entity as the "Employer."

plan document that reinstated the provision expressly requiring that any surplus be returned to the Employer. The surplus was estimated at that time to be somewhere between $200,000 and $1,000,000.

So-called effects bargaining, which had been in progress between the Employer and the Union during the summer, resulted in written shutdown agreement signed on October 17, 1991 (the "Shutdown Agreement"). The Shutdown Agreement ratified the termination of the 1978 Pension Agreements on September 30, 1981, saying, "The said basic Labor Agreements and all ancillary agreements related thereto (e.g. the Insurance Agreements and the Pension Agreements) terminated on September 30, 1981 at 11:59 p.m." Pursuant to the Shutdown Agreement, the Employer paid over $641,000 in immediate, additional benefits that the employees were not otherwise entitled to, such as severance pay. With that, the bargaining relationship between the Employer and Union, with regard to Fort Pitt Bridge and Electric Weld, ended.

While the 1978 Pension Agreements terminated on September 30, 1981, the pension plan embodied in those agreements was not terminated at that time.[2] Rather, on November 18, 1981, promptly after the Shutdown Agreement was concluded, the Employer formalized the adoption of the amended and restated pension plan which the

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[2] Under ERISA, a pension plan is a juridical entity not unlike a corporation, trust or estate. *See* ERISA section 502(d)(1), 29 U.S.C. § 1132(d)(1). It can be terminated only by successfully completing the process set out in Title IV of ERISA, including the approval of the Pension Benefit Guaranty Corporation. ERISA sec. 4041(a)(1), 29 U.S.C. § 1341(a)(1).

Employer had provided to the Union during the effects bargaining. The amended and restated plan restored the provision (which the plan had included from 1950 to 1963) requiring that surplus assets remaining after plan termination be returned to the Employer.

In May 1988, the Employer terminated the pension plan under Title IV of ERISA, properly and timely notifying the participants in the pension plan, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service. After all necessary approvals were received, the administrator of the plan purchased a group annuity contract satisfying all liability for all pension benefits under the plan[3] and then, carrying out the express terms of the plan, returned the remaining surplus to the Employer. At termination, as it had from 1950 to 1963 and then again since the shutdown in 1981, the plan expressly required that residual assets be returned to the Employer.

2. In November 1988, respondents Jean Brytus, John Lazor, Wheat Giacobbe, John Stanko, Steve Kotyk and Alex Warcholak (all participants or beneficiaries of the pension plan) filed suit in the U. S. District Court for the Western District of Pennsylvania (No. 88-2548) claiming that the Employer's recovery of the surplus assets (a) violated the 1978 Pension Agreements and therefore was actionable under section 301 of the Labor Management Relations Act, (b) deprived respondents of their right to enjoy the surplus and therefore was actionable under

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[3] By this method, required by regulations of the Pension Benefit Guaranty Corporation under ERISA, all participants in the plan have received (or will receive) all accrued and vested pension benefits due them under the plan. 29 C.F.R. § 2617.6(a).

sections 502(a)(1)(B) and 502(a)(3) of ERISA, and (c) constituted a breach of fiduciary duty under section 404(a) of ERISA. Substantially identical actions were filed in March 1989 by respondents John Kotyk and Sam Borielle (No. 89-579) and in June 1991 by respondent Edward Golonka (No. 91-1041).[4] The three actions were treated as one in the district court and in the court of appeals (and are so treated in this petition).

Respondents moved for summary judgment asserting that the 1978 Pension Agreements constituted the *only* documents in which the terms of the plan were to be found when the plan terminated in 1988, despite the fact that the 1978 Pension Agreements had terminated in 1981. Respondents further asserted that the Employer's purported amendment of the pension plan in 1981 to reinstate the provision for reversion of surplus assets to the Employer was invalid because the 1978 Pension Agreements contained no provision for amendment and thus were effectively unamendable. Finally, respondents asserted that the 1978 Pension Agreements plainly barred reversion of the surplus assets to the Employer.[5]

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[4] In the first case, plaintiffs' motion for class certification was denied as untimely, so the same counsel filed the second case and made a timely motion for class certification. When the motion was denied in the second case, on the ground that it represented evasion of the ruling in the first case, different counsel was recruited to file the third case.

[5] Respondents' motion for summary judgment was based solely on the 1978 Pension Agreements. No claim was made with regard to the Shutdown Agreement.

On September 6, 1994, the district court (per Donald J. Lee, J.) granted respondents' motion for summary judgment as to liability, adopting as its opinion the report and recommendation of June 30, 1994 by Magistrate Judge Kenneth L. Benson (the "Opinion"). As to the continued vitality of the 1978 Pension Agreements after they terminated in 1981, the Opinion agreed with respondents, expressly holding that:

> although the [1978] Pension Agreement did terminate in 1981, it was, at the time of termination, *the sole governing plan document* . . . Thus, the [1978 Pension] Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the [1978 Pension] Agreement's termination.

App. at 19a-20a (emphasis added). As to the ability of the Employer to amend, the Opinion expressly held that the Employer had no ability to amend the plan, since the 1978 Pension Agreements (being collective bargaining agreements) did not contain any provision for amendment:

> Spang's attempts to amend the Plan in November, 1981 [to reinstate the provision for reversion of surplus assets to the Employer], and June, 1988, must necessarily fail. In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), the court found that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document [*i.e.*, the 1978 Pension Agreements], does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, any

> proposed amendments in 1981 and 1988 are invalid.

App. at 20a. And, finally, the Opinion agreed with respondents that the 1978 Pension Agreements forbade reversion of surplus pension assets to the Employer:

> It remains, then, to determine if the provisions in question entitle plaintiffs to summary judgment. Indeed, a reading of the Plan [the 1978 Pension Agreements] establishes that Spang may not retain the surplus. Further, the Plan [the 1978 Pension Agreements] also provides that, upon termination, the funds in the Plan shall be distributed in accordance with Section IX. That section provides for distribution of plan funds to participants. Although surplus funds are not specifically addressed therein, reading Section IX in concert with the non-reversion provision leads to the inescapable conclusion that the surplus funds must be distributed to the participants in the fund. In any event, reversion to Spang is certainly not permissible. Summary judgment is appropriate in this case.

App. at 21a.

Having granted summary judgment to respondents, the district court referred the matter of remedy to the magistrate judge. On February 10, 1995, the magistrate judge issued a report and recommendation as to remedy, which the district court adopted as its opinion by order of March 30, 1995, ordering that the plan be reconstituted, that the Employer be required to repay the reversion with interest, and that all participants and beneficiaries of the plan share in the recovery. The report and recommendation as to remedy expressly stated that relief was granted

under ERISA sections 502(a)(1)(B) and 502(a)(2), rather than under section 301 of the LMRA. App. at 46a.

3. The U. S. Court of Appeals for the Third Circuit affirmed without opinion. App. at 1a.

REASONS FOR GRANTING THE PETITION

This case sits at the intersection of federal labor law and employee benefit law. Labor law applies because the Employer and Union had a collective bargaining relationship and entered into collective bargaining agreements governed by the NLRA, namely, the 1978 Pension Agreements. Employee benefit law applies because those collective bargaining agreements obligated the Employer to provide pensions and thus gave rise to a pension plan. The question is how ERISA and the NLRA are to be applied after the collective bargaining agreement terminates and the collective bargaining relationship ends.

It is well established under the NLRA that, after the collective bargaining agreement terminates and the collective bargaining relationship ends, the employer is free to alter its employee benefit plans in any way that does not contravene rights that accrued or vested contractually before the collective bargaining agreement terminated. On the other hand, this Court's decision last term in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), reflects the principle that an employee benefit plan under ERISA may be unamendable if it does not contain a procedure for amending the plan, and collective

bargaining agreements rarely contain a procedure for amendment.

The decision below applies the *Curtiss-Wright* principle and concludes that the pension plan embodied in the 1978 Pension Agreements was unamendable even after the 1978 Pension Agreements terminated. As explained in the first point below, the decision below thereby puts ERISA squarely at odds with the NLRA and resolves the conflict by trampling the NLRA. As such, it conflicts with the jurisprudence of this Court under the NLRA and creates a conflict among the circuits, others of which have been able to harmonize ERISA and the NLRA in this regard without subordinating either.

As explained in the second point below, harmony between ERISA and the NLRA can be achieved simply by understanding that, with regard to an employee benefit plan embodied in a collective bargaining agreement, the "procedure for amending such plan" (required by ERISA) is the framework of law supplied by the NLRA for creating, amending and terminating collective bargaining agreements. Harmonizing ERISA and the NLRA not only makes sense; it is compelled by the express provision of ERISA that ERISA shall not be construed to impair any other federal law. And it avoids the absurd and intolerable result of the decision below that collective bargaining agreements have eternal life – controlling in perpetuity the terms of employee benefit plans embodied in them, even after the collective bargaining agreements themselves have terminated.

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS AS TO THE AMENDABILITY OF AN EMPLOYEE BENEFIT PLAN, EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT, AFTER THE COLLECTIVE BARGAINING AGREEMENT TERMINATES AND FURTHER CONFLICTS WITH THIS COURT'S JURISPRUDENCE UNDER THE NLRA.

It is well established under the NLRA that after a collective bargaining agreement terminates, the employer is no longer bound by that agreement except to honor rights that accrued or vested contractually under the agreement before it terminated:

> [A]n expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied . . . "An expired [collective bargaining agreement] . . . is no longer a 'legally enforceable document' " . . .
>
> * * *
>
> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 206-208 (1991).[6]

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[6] After the contractual relationship ends (due to termination of the collective bargaining agreement), the NLRA

It is equally clear under ERISA that a program of employee benefits brought into being by a collective bargaining agreement may constitute an "employee benefit plan" within the meaning of ERISA.[7] In that instance, ERISA compels recognition of a legally distinct "plan" that is subject to the substantive minimum standards of ERISA, and so the plan must honor any rights guaranteed by ERISA, even after expiration of the collective bargaining agreement that gave rise to the plan. For example, ERISA requires that pension plans contain a vesting schedule meeting the requirements of ERISA. ERISA sec. 203, 29 U.S.C. § 1053. After the termination of a collectively bargained pension agreement, an employer may

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statutorily prohibits the employer from changing the terms and conditions of employment going forward, so long as the bargaining relationship exists, unless and until the employer and union reach impasse in negotiations for a new collective bargaining agreement or the union waives its right to bargain. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988). The statutory duty to maintain the status quo is not involved in this case, however, since the plant was closed, and all bargaining unit employees terminated, coincident with the termination of the 1978 Pension Agreements on September 30, 1981. Instead, this case is focused strictly on the supposed perpetual vitality of the 1978 Pension Agreements *as contracts* after they terminated on September 30, 1981.

[7] ERISA defines employee benefit plans as "any plan, fund or program" established or maintained by an employer providing benefits of specified types. ERISA sections 3(1), -(2) and -(3), 29 U.S.C. §§ 1002(1), -(2) and -(3). It matters not whether the terms of the "plan, fund or program" are set forth in an officially designated plan document, an insurance contract, a collective bargaining agreement, or any other written form.

not amend the pension plan so as to reduce the vesting below the substantive minimum standard required by ERISA.

So understood, the requirements of ERISA and the NLRA have peacefully co-existed in the decisions of the courts of appeal until the decision below. When an ERISA-covered plan has been created by a collective bargaining agreement but the collective bargaining agreement has terminated, and then employees or former employees have sued for benefits to which they believed they were entitled, the courts of appeal have made a two-step inquiry. First, the courts have inquired whether the right asserted is *statutorily* accrued and vested under ERISA. If not, the courts have made a second inquiry whether the right was *contractually* accrued or vested before the collective bargaining agreement terminated. If not, the courts of appeals have unanimously concluded (until the decision below) that no such right exists.

For example, in *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994), a collective bargaining agreement embodied a number of employee benefit plans including a severance pay plan. In connection with the closing of the plant, the employer and union negotiated a shutdown agreement that superseded and terminated the collective bargaining agreement that embodied the severance pay plan. Nevertheless, former employees sued for severance pay under the severance pay plan. The Sixth Circuit held that, after termination of the collective bargaining agreement, there was no continuing right to severance pay because (a) ERISA does not require accrual or vesting of welfare benefits such as

severance pay and (b) severance pay was not contractually vested before the collective bargaining agreement terminated.

The Sixth Circuit specifically held in *Adcox v. Teledyne, Inc.*, on facts analytically identical to the present case, that the terminated collective bargaining agreement was no longer "in force," and therefore conferred no rights, not even jurisdiction under ERISA.[8] The Sixth Circuit had earlier reached the same result on essentially the same facts in *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989).[9]

In the present case, the right asserted (an inchoate interest in the surplus pension assets) was neither

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[8] The Sixth Circuit noted, "the earlier, superseded collective bargaining agreement would have to be 'in force' for the district court to have jurisdiction over those claims under § 1132 [claim for benefits under ERISA section 502]; because it had 'expired' when a subsequent superseding agreement was made, it was no longer 'in force' and thus the district court lacked jurisdiction to enforce it." 21 F.3d at 1388.

[9] "Because Section 502 [of ERISA] authorizes suits for benefits to be brought in federal court only while a collective bargaining contract remains in force, the district court in this case did not have jurisdiction over Heussner's claims in counts four, five and six. These claims were brought pursuant to the terms of a contract (the 1984 Agreement) that had been allegedly superseded and, consequently, could not be 'in force' unless the superseding 1987 Agreement were to be rescinded. Because the collective bargaining contract upon which Heussner based his claims for benefits is not currently in force, the district court did not err in its conclusion that it lacked subject matter jurisdiction over the claims made for benefits under Section 502 of the Employee Retirement Income Security Act." 887 F.2d at 677.

accrued and vested under ERISA[10] nor contractually vested under the 1978 Pension Agreements before they terminated.[11] Yet, without ever concluding that such right was accrued or vested under either ERISA or the 1978 Pension Agreements, the decision below concludes that such a right survived the termination of the collective bargaining agreements and could not be altered by the employer:

> Thus, the [1978 Pension] Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the [1978 Pension] Agreement's termination.

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[10] An inchoate interest in pension surplus that might exist upon future termination of a pension plan is not part of an employee's "accrued benefit" under ERISA and therefore cannot be vested. On the contrary, by definition, surplus is the money left over after all accrued and vested pension benefits under the plan have been satisfied. PBGC Op. Ltrs. 89-01 and 85-10; Treas. Reg. § 1.401-2(b)(1); *Nobers v. Crucible Inc. 1975 Salaried Retirement Plan*, 925 F.2d 418, 13 Emp. Ben. Cas. (BNA) 2741 (3d Cir. 1991); *Walsh v. Great Atlantic & Pacific Tea Co.*, 96 F.R.D. 632 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983). Respondents admitted on brief that their claim to the surplus is not even a claim for a "benefit," much less an accrued or vested pension benefit protected by ERISA, saying their "claims, relating to the distribution of excess funds, can by no stretch of language be considered 'claims for benefits.' "

[11] Once again, respondents admitted on brief that they had no right to the surplus under the 1978 Pension Agreements when those agreements terminated in September 1981: "No participant had a right to the surplus increment in 1981."

App. at 20a. The decision below therefore directly conflicts with the decisions of the Sixth Circuit in *Adcox v. Teledyne, Inc.* and *Heussner v. National Gypsum Co.*

In addition, the decision below conflicts with the decisions of many courts of appeals regarding amendment or termination of retiree health or life insurance maintained pursuant to a collective bargaining agreement that terminates. For example, in *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989), an ERISA-covered insurance plan was embodied in a collectively bargained insurance agreement that provided insurance for retirees. When the collectively bargained insurance agreement terminated, however, the employer terminated insurance for retirees. When the retirees sued, the Eighth Circuit held that, since ERISA does not prescribe vesting for welfare benefits and the benefits were not contractually vested before the insurance agreement terminated, the employer was no longer bound by the terminated insurance agreement and was privileged to amend or terminate the insurance plan.

The same two-step analysis has been applied routinely by the courts of appeal in other retiree insurance cases. Where the courts have concluded that no right to continued benefits was provided either statutorily (under ERISA) or contractually (under the terminated collective bargaining agreement), they have harmonized ERISA and the NLRA by holding that the employer was free to amend or terminate the plan after termination of the collective bargaining agreement. Needless to say, those retiree insurance cases would have been decided differently if it were true, as the decision below holds, that an employer is powerless to amend an employee benefit

plan embodied in a collective bargaining agreement after the collective bargaining agreement terminates. The decision below is therefore in conflict with *Anderson v. Alpha Portland Industries, Inc.*, and the other retiree insurance cases which have been decided in favor of the employer.

More broadly, it is easy to see that the decision below is in conflict with every court of appeals decision that recognizes an employer's right to amend an employee benefit plan embodied in a collective bargaining agreement after the collective bargaining agreement terminates and the employer is no longer bound by the NLRA to maintain the status quo. For example, the decision below conflicts with decisions permitting an employer to amend or terminate employee benefit plans embodied in collective bargaining agreements after bargaining to impasse with the union. *See, e.g., Merk v. Jewel Cos., Inc.*, 848 F.2d 761 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988).[12]

And, in the largest view, the decision below directly conflicts with this Court's longstanding jurisprudence that only rights which contractually accrued or vested prior to termination survive the termination of a collective bargaining agreement. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991), *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977),

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[12] Even the "Bible" of plaintiffs-side ERISA litigation, generally representative of the most aggressive claim posture, readily concedes, "The bilateral restrictions on plan amendments inherent in collective bargaining disappear if the collective bargaining agreement expires and the employer, after bargaining to impasse over proposed amendments, unilaterally puts the proposed amendments into effect." S. Bruce, *Pension Claims: Rights and Obligations* 471 (BNA Books, 2d ed. 1993).

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971). Directly contrary to this Court's holdings under the NLRA, the decision below in effect elevates *the entire collective bargaining agreement* to the status of a contractually vested right that survives the termination of the agreement.

This Court's review is needed to resolve the conflict among the circuits, as well as the conflict with this Court's uniform jurisprudence under the NLRA, created by the decision below as to the continuing effect of a terminated collective bargaining agreement and, more particularly, the ability of the employer to eliminate benefits that have neither accrued nor vested prior to termination of that agreement.

II. BY MISAPPLYING THIS COURT'S DECISION IN *CURTISS-WRIGHT CORP. V. SCHOONEJONGEN*, THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF CONFLICT BETWEEN ERISA AND THE NLRA AND CREATES AN INTOLERABLE BURDEN ON COLLECTIVELY BARGAINED EMPLOYEE BENEFIT PLANS.

The decision below creates an intolerable conflict between ERISA and the NLRA by misapplying the case of *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), which focused on the employer's right to amend an employee benefit plan. ERISA section 402(b)(3), 29 U.S.C. § 1102(b)(3), requires every employee benefit plan subject to ERISA to contain "a procedure for amending such plan, and for identifying the persons who have

authority to amend the plan." In *Curtiss-Wright*, the question was whether a brief statement such as "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan" constituted an adequate amendment procedure under ERISA.

The question arose in *Curtiss-Wright* because, absent an effective amendment procedure, an employee benefit plan might effectively be rendered unamendable.[13] While the Third Circuit held that the simple procedure in the Curtiss-Wright plan was inadequate under ERISA (and therefore that the plan was unamendable), this Court concluded that the procedure was perfectly adequate under ERISA and remanded for consideration of the factual question of whether the procedure set forth in the plan had actually been followed.

The decision below is expressly premised on *Curtiss-Wright*. It holds that the 1978 Pension Agreements governed the plan, that the 1978 Pension Agreements lacked any procedure for amendment, and therefore, under *Curtiss-Wright*, that the Employer was powerless to amend the plan after the 1978 Pension Agreements terminated, thus endowing those terminated collective bargaining agreements with eternal life contrary to the NLRA. The conflict thus created between ERISA and the NLRA is entirely unnecessary, however, and itself violates ERISA.

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[13] As this Court said, "for a plan not to have such a procedure [a valid amendment procedure] would risk rendering the plan forever unamendable under standard trust law principles. See Restatement (Second) of Trusts § 331(2) (1957)." Slip Op. at 16.

It is true, of course, that collective bargaining agreements generally do not provide a procedure for amendment. This is because collective bargaining agreements are contracts. In a contract, the parties need not reserve in the document any power to amend; as a matter of law, they are privileged to amend at any time by mutual agreement. 1A A. Corbin, *Corbin on Contracts* § 186 (1963); *Restatement (Second) of Contracts* § 89(a) (1979). As a result, collective bargaining agreements – even those that embody employee benefit plans – typically are silent as to amendment. For obvious reasons, virtually none permit unilateral amendment by the employer.

Instead, as explained above, the NLRA creates the context of law within which collective bargaining agreements are created, amended and terminated. Conflict between ERISA and the NLRA can be avoided entirely if the "procedure for amending such plan" is understood, in the case of a plan embodied in a collective bargaining agreement, as the regulatory framework of the NLRA. Thus, while a collective bargaining agreement is in force, under the NLRA the parties may amend it at any time by mutual consent. After it terminates, under the NLRA the employer may amend it in any way that does not abridge rights that accrued and vested while it was in effect. In this way, if the rules of the NLRA are recognized as the procedure for amending the plan, ERISA (based on the law of trusts) and the NLRA (based on the law of contracts) are harmonized.

Harmony between ERISA and the NLRA is not merely desirable, however; it is expressly required by ERISA. While Congress sweepingly pre-empted *state* law relating to employee benefit plans, as this Court has

repeatedly held, it specifically provided that ERISA should not be construed to impair any other *federal* law:

> Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

ERISA sec. 514(d), 29 U.S.C. § 1144(d).[14] Needless to say, by giving eternal life to terminated collective bargaining agreements, the decision below impairs the NLRA and therefore directly violates ERISA. There is no indication in ERISA or its history that Congress intended the trust-based rules of ERISA to be interpreted in such a way as to abrogate the settled contract-based rules of the NLRA.

By overlooking the framework of law supplied by the NLRA as the "procedure for amending such plan," the decision below not only misapplies *Curtiss-Wright*, thus impairing the NLRA and violating ERISA, but creates the absurd and intolerable result that employee benefit plans embodied in the typical collective bargaining agreement are *unamendable* after the collective bargaining agreement terminates and the collective bargaining relationship ends. Indeed, if the decision below were faithfully applied, it would produce the same absurd result with regard to *extant* collective bargaining agreements. Thus, if a collective bargaining agreement embodied an employee

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[14] The exceptions are not relevant here. They concern repeal of the predecessor Welfare and Pension Plans Disclosure Act of 1958 and authorization of additional personnel in the Department of Labor.

benefit plan and (as usual) lacked a procedure for amendment, presumably even the *employer and union acting by mutual consent* would be powerless to amend it under ERISA – yet a further repudiation of longstanding statutory and case law under the NLRA. *See* NLRA section 8(d) (expressly contemplating mid-term modifications and setting conditions therefor), *NLRB v. Sands Manufacturing Co.*, 306 U.S. 332 (1939).

This case clearly illustrates the mischief that follows from the erroneous conclusion that employee benefit plans, previously embodied in collective bargaining agreements, cannot be amended after the collective bargaining agreement terminates. In this case, the pension plan provided for reversion of surplus assets to the Employer from its adoption in 1950 until 1963. During a period of collective bargaining from 1963 to 1981, the Employer agreed not to take back its contributions if the plan terminated. But after the last collective bargaining agreement terminated, and the Employer was no longer subject to any contractual agreement regarding disposition of the surplus, the Employer amended the pension plan to reinstate the plan to its original terms.

Reinstatement of the original terms of the plan was clearly proper under the NLRA, because the Employer no longer had a contractual obligation to do otherwise and any inchoate interest of the employees in a share of the surplus upon eventual termination of the plan was neither accrued nor vested contractually when the 1978 Pension Agreements terminated. Reinstatement of the original terms of the plan was also proper under ERISA, because an inchoate interest in the surplus is not an accrued benefit protected by the vesting provisions of

ERISA.[15] Yet the decision below, in contravention of the NLRA and contrary to every other court of appeals that has considered the question, denied the Employer the right to amend the pension plan to restore it to its original condition after the 1978 Pension Agreements terminated, expressly holding that the 1978 Pension Agreements control after their termination.[16]

The question presented here is important for the broad range of employee benefit plans embodied in collective bargaining agreements.[17] Needless to say, if those

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[15] Of course, employees *did* have a vested right to their accrued benefits under the plan – their regular monthly pensions calculated in accordance with the benefit formula in the plan – and those rights were all fully satisfied upon termination of the plan, as required by ERISA.

[16] This Court has previously been called upon to harmonize ERISA and collective bargaining under federal labor law and has always succeeded. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988). Notably, in *Robinson*, this Court held that it was not a breach of fiduciary duty under ERISA to observe the terms of a collective bargaining agreement that did not violate any substantive provision of ERISA. The same should apply here, where the employer was freed from any collectively bargained obligation by observing the *termination* provision of a collective bargaining agreement.

[17] According to the latest tabulation of annual reports, there are over 14,000 private, single-employer pension plans that are maintained pursuant to collective bargaining agreements. U. S. Department of Labor, *Abstract of 1992 Form 5500 Annual Reports* 9, 59 (1996). While published statistics are not available, there are undoubtedly many times that number of welfare plans maintained pursuant to collective bargaining agreements.

plans are unamendable because the collective bargaining agreement lacks an express amendment provision, then amendments adopted by unions and employers in triennial collective bargaining have been invalid ever since ERISA was enacted in 1974, thus casting the terms of the plans into doubt and permitting participants to sue for any benefits that have been reduced or eliminated by those amendments. In this respect, this case resembles both *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995), and *Lockheed Corp. v. Spink, cert. granted*, 116 S.Ct. 806 (1996), both of which involved the realistic threat of wholesale invalidation of previous amendments to employee benefit plans.

Going forward, there is a substantial question whether plans embodied in collective bargaining agreements, if they are unamendable for lack of an express amendment provision, can even be amended to insert an amendment provision. If not, employers will in effect have guaranteed perpetual benefits where they reasonably believed they had guaranteed benefits only for the life of the collective bargaining agreement, imposing an unexpected burden (and, we believe, a burden wholly unintended by Congress) that can only lead to reduction or elimination of employee benefit plans. Even if the plans can be amended to insert an amendment provision, the change will require the consent of the union, which will likely exact a steep price for "giving up a right" that employees would otherwise enjoy, once again imposing a burden that Congress did not intend and employers could not have expected. Ironically, the burdens imposed by the misguided decision below will have the effect of discouraging employee benefit plans, directly contrary to

the purpose of ERISA to promote and expand employee benefits.

Nor can the problem be contained within the Third Circuit. Given the interstate reach of many employee benefit plans and the liberal venue and nationwide service of process provisions of ERISA, all it takes is one participant in the Third Circuit to institute a class action on behalf of all participants nationwide.[18] Plans all across the United States will be exposed to egregious forum-shopping if clever class-action counsel can identify even one employee or retiree residing in Pennsylvania, New Jersey, Delaware or the Virgin Islands – not a difficult task with respect to most companies of national stature.

CONCLUSION

This Court's review is urgently needed to resolve the conflict among the circuits as to the amendability of an employee benefit plan, embodied in a collective bargaining agreement, after the collective bargaining agreement terminates. This Court's review is further justified by the important question of conflict between ERISA and this Court's jurisprudence under the NLRA created by the decision below, in contravention of the express intent of Congress that ERISA be applied harmoniously with other federal law, and the absurd and intolerable consequence

[18] ERISA effectively permits an action to be brought in any district where the participant resides, on the ground the breach occurred there; this is all the more true for retirees, who may retire to any circuit regardless of where their former employer conducted business. ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2).

of the decision below that terminated collective bargaining agreements are given perpetual binding effect in their entirety.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3218 and 95-3248

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and others similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA, PLANT

(D.C. Civil No. 91-cv-01041)

SPANG & COMPANY AND THE PENSION PLAN FOR FORMER GARGAINING [*sic*] UNIT EMPLOYEES OF FORT PITT BRIDGE and ELECTRIC WELD DIVIDEION [*sic*] OF CANONSBURG, PA, PLANT,

Appellants in No. 95-3218

(Amended per the Clerk's order of 8/29/95)

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and others similarly situated

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SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA, PLANT

(D.C. Civil No. 91-cv-01041)

JEAN E. BRYTUS, JOHN LAZOR, WHEAT GIACOBBE, JOHN STANKO, STEVE KOTYK, ALEX WARCHOLAK and others similarly situated; JOHN KOTYK, SAM BORIELLE and others similarly situated, EDWARD J. GOLONKA, and others similarly situated,

Appellants in No. 95-3248

(Amended Per the Clerk's order of 8/29/95)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 88-02548)
District Judge: Honorable Donald J. Lee

Argued January 29, 1996

BEFORE: GREENBERG, NYGAARD, and LAY,*
Circuit Judges

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the orders of the district court entered September 6, 1994, and March 30, 1995, be and are hereby affirmed.

The parties will bear their own costs of these appeals.

BY THE COURT:

/s/ Illegible
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: FEB 7 1996

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos. 88-2548
	)	90-1805, 91-1041
SPANG & COMPANY	)	JUDGE DONALD J. LEE/
LITIGATION	)	MAGISTRATE JUDGE
	)	BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

At issue in these consolidated cases is the proper disposition of "left-over" or surplus funds from a retirement account governed by the provisions of the Employee Retirement Income Security Act ("ERISA"). The first action filed, Civil Action No. 88-2548, was filed by six participants in the retirement fund against Spang & Company ("Spang") and the Pension Plan. A second action was filed by two more claimants at Civil Action No. 89-579. The second action was consolidated with the first, and 89-579 was closed by order of court, and plaintiffs there were joined with plaintiffs at the earlier number. Spang filed a lawsuit at Civil Action No. 90-1805 against the United Steelworkers of America, AFL-CIO-CLC ("the Union"), alleging breach of contract for encouraging the participant litigation. Finally, at Civil Action No. 91-1041, another Plan participant filed suit against Spang and the Pension Plan. Presently before the court are several motions. First, with respect to 88-2548, it

is respectfully recommended that the motion for summary judgment filed by plaintiffs (Docket #28) be granted; that Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys (Docket #31) be denied; that Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on Count II of Plaintiffs' Complaint (Docket #34) be denied; that Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial (Docket #35) be denied as moot; that Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests for Extracontractual Damages and Class Wide Relief (Docket #36) be granted; and that Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint be denied. It is further recommended that the motion to dismiss filed by the Union at 90-1805 (Docket #6) be granted, and that the motion to maintain class action and for certification of class at 91-1041 (Docket #8) be denied.

II. REPORT

This case has become much more complex than it need to have, partly due to the manner in which it has been litigated (which has resulted in a number of suits instead of one, and a number of related motions), and partly due to delays which were caused in large part by the court.[1] In any event, there are dispositive as well as

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[1] By this comment, I do not mean to imply that any such delay was intentional or even entirely avoidable. This case has, however, languished at various times due to transfers from judge to judge, and, after a report and recommendation addressing all of the outstanding motions was filed, was subject

non-dispositive motions presently pending before the court in these consolidated cases. The motions have been briefed, rebriefed, and argued. The matters are now ripe for disposition.

FACTUAL BACKGROUND

Plaintiffs[2] at 88-2548 and 91-1041 are persons entitled to receive benefits under a pension plan (the "Plan") sponsored and administered by the Plan's sole trustee, Spang, for the benefit of employees at Spang's Fort Pitt Bridge and Electric Weld plants in Canonsburg, Pennsylvania. The Plan was established and operated pursuant to a series of collective bargaining agreements between Spang and the Union between 1963 and 1981, when the last agreements expired and the plants were closed.[3] From 1963 through 1981, the Pension Agreements entered into between the parties provided for defined benefits,

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to further delay due to the *sua sponte* recusal of Judge (then Magistrate Judge) Lancaster. Finally, this matter has not been dealt with by my chambers with the dispatch I would have liked. In all of the above instances, the delay has not been without reason. Nonetheless, litigants ought to expect more prompt treatment of even a complex matter such as this. For my own part in this history of delay, I offer my sincere apologies.

[2] Although Spang is also a "plaintiff" at a consolidated case, 90-1805, I will hereafter refer to the pensioners as "plaintiffs" for purposes of continuity.

[3] Separate agreements were entered into for each of the plants, although the provisions of each agreement are identical. Hence, there will be no differentiation made between them for purposes of this report.

i.e., that employees would be entitled to a pension calculated by a formula contained in the Agreements. Funding for the Plan from 1963 through 1976 was based upon a specified contribution by Spang for each hour worked by each employee. This method changed in 1976 when the parties agreed that Spang would fund the Plan in accordance with ERISA's provisions.

In each of the Pension Agreements entered into between the Union and Spang beginning in 1963, and including the last agreement in 1978, the following provision appeared:

> The contributions made by the Company to the Pension Fund may not under any circumstances revert to the Company. If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX of this Agreement.

In 1981, prior to the time that the plants were closed, Spang and the Union met to settle differences concerning the manner of the closing and the wages and other benefits due to union members. The result was a "Shutdown Agreement" signed by the Union and Spang on October 13, 1981, and made effective as of October 1, 1981. With respect to pensions, the Shutdown Agreement provides as follows:

> 1. Participants.
>
> All eligible participants will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements, based on the Continuous Service accrued through September 30, 1981, provided, however, that any participant terminated under paragraph 2 above

> shall continue to accrue Continuous Service, for pension purposes only, until the earliest of (a) retirement, (b) the second anniversary date after the date the participant commenced his most recent layoff, (c) employment by a Division or subsidiary of Spang & Company, or (d) September 30, 1983.
>
> 2. Retired Participants.
>
> All retired participants will continue to receive the pension benefits to which they are entitled.

Additional provisions which related to the pension benefits, and are not relevant to this dispute, provided for the revocation of certain applications for early retirement and a waiver of Spang's rights under the Pension Agreements to deduct severance pay from pension payments.

Also part of the Shutdown Agreement is the following release:

> 6. The benefits set forth in this Agreement shall be in complete discharge of any and all claims of the Union and of employees under the terminated basic Labor Agreements dated as of October 1, 1978 and all ancillary agreements related thereto (e.g. the terminated Insurance Agreements and the terminated Pension Agreements), and receipt and acceptance of such benefits by an employee shall constitute a complete release of any and all claims, including any pending grievances, file [sic] or unfiled. The Company may request each such former employee to sign an individual acknowledgement of this paragraph.

Individual copies of this release were distributed to employees. On November 18, 1981, the board of directors

of Spang adopted an amended and restated Plan which added a provision that any surplus in the pension fund after plan termination would be returned to the employer. No notice was sent to the pension participants that this amendment had been made.[4]

In early 1988, Spang again amended the Plan. Spang thereafter decided to terminate the Plan, and undertook to comply with various requirements for accomplishing this task. When approval was given by regulatory agencies, the administrator of the Plan purchased group annuity contracts which would provide each of the participants benefits based upon the formula set forth in the Plan. The surplus funds were then returned to Spang pursuant to the amendment to the Plan adopted in 1988. These lawsuits ensued.

Plaintiffs allege three causes of action against Spang. The first seeks relief pursuant to Section 301 of the Labor Management Relations Act ("LMRA") for alleged violations of the terms of the 1978 agreement. The second, filed pursuant to Section 502 of the Employee Retirement Income Security Act ("ERISA"), alleges a violation of the Plan. Finally, the third cause of action is for a breach of fiduciary duties pursuant to Section 404 and 502 of ERISA.

Spang has responded with the motions listed above, and also with a lawsuit against the Union and various of

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[4] I understand Spang's assertions that its intention to make such an amendment had been communicated to the Union prior to the negotiation of the Shutdown Agreement. For reasons discussed later in this report, however, such evidence is irrelevant.

the Union's agents and officers. Spang seeks recovery of the costs and fees it has expended in litigating this action on the theory that the Union bargained away plaintiffs' rights to the surplus funds in the Pension Fund pursuant to the 1981 Shutdown Agreement. The Union has filed a motion to dismiss that lawsuit.

LEGAL STANDARDS

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, " . . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth ". . . . specific facts showing that there is a *genuine issue for trial* . . . " or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Where the terms of a contract are clear and unambiguous, the court must rely on the contract language as evidencing the intent of the parties. *Langer v. Monarch Life Ins. Co.*, 879 F.2d 75, 81 (3d Cir. 1989). The court ought to give the language in a contract its plain and accepted meaning. *Intern. Broth. of Boilermakers v. Local Lodge D504*, 866 F.2d 641, 645 (3d Cir.1989).

1. SPANG'S MOTIONS – LIMITATIONS, WAIVER AND EXHAUSTION

THE LMRA CLAIMS

Spang seeks summary judgment with respect to each of plaintiffs' claims on the basis of the statute of limitations, and with respect to the LMRA claim on the basis of waiver. Plaintiffs' LMRA claim is that Spang breached the 1978 collective bargaining agreement by taking the surplus funds. Spang first asserts that the Union bargained away the right to rely upon the agreement's non-reversion clause in entering into the 1981 Shutdown Agreement. Voluminous evidence has been presented concerning the negotiations leading up to the Shutdown Agreement itself. That evidence is, however, irrelevant in the face of unambiguous language in the contract which provides that it is to be interpreted without resort to negotiation history.

In reviewing the agreement itself, it is apparent that the parties did not reach an agreement with respect to the surplus funds. Those funds are not mentioned in any part of the agreement. Spang argues, however, that the general release of all "claims, . . . filed or unfiled" bars the plaintiffs from asserting any claim under the Pension

Agreement. No claim to surplus funds, however, had been filed or even existed at the time that the Shutdown Agreement was signed. In fact, such a claim would only become ripe should the Plan be terminated and the surplus funds be used in a manner inconsistent with the Pension Agreement, or, perhaps, when an amendment to the Plan was adopted providing for reversion. Neither of these eventualities had occurred at the time the Shutdown Agreement was executed. Further, the Shutdown Agreement specifically provides that all participants "will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements. . . . " It is undisputed that the Pension Agreements in question provide that Spang's contributions to the Fund will "under no circumstances" revert to Spang, and that upon termination all funds will be distributed in accordance with the provisions of the Plan. Thus, one of the "benefits" pursuant to the Pension Agreements is the receipt of any surplus funds available upon termination of the Plan. In short, far from bargaining away the right to surplus funds, the Union obtained for its members an additional promise to apply the terms of the terminated Pension Agreements, including the language concerning surplus funds. Thus, the existence of the Shutdown Agreement is not a bar to the plaintiffs' claims under the LMRA.[5]

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[5] As an alternative argument in support of their position, plaintiffs note that a lawsuit was filed on October 6, 1981, after the Union was given a copy of a proposed amended Plan which included provisions for reversion of surplus funds to Spang upon termination. Negotiations begun after initiation of the suit resulted in the Shutdown Agreement, and settlement of the suit. At a hearing on the proposed settlement, the Union's attorney

Spang next argues that plaintiffs' claims under the LMRA are barred by the statute of limitations. In this respect, Spang relies upon *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), for the proposition that the six-month statute from the National Labor Relations Act ("NLRA") applies. In *DelCostello*, however, the court was faced with a hybrid cause of action alleging both a breach of the collective bargaining agreement against the employer and a breach of the duty of fair representation against the union. Here, the only claim is

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stated his belief that the company would keep the existing Plan in effect, and that the issue of reversion of the surplus benefits would become ripe when the Plan was terminated. Spang's attorney, given an opportunity to respond, stated that Spang could not ask participants to waive their rights "*in futuro*," and that the release contained within the Shutdown Agreement did not apply to those rights. Plaintiffs assert that these representations in open court estop Spang from relying upon the Shutdown Agreement as a waiver of plaintiffs' rights under the Pension Agreement. I agree. Spang's attorney made representations to the court in furtherance of Spang's interest in garnering court approval of the settlement of a lawsuit, and in direct response to the court's concern that the Plan's participants not be prejudiced by settlement. Spang now argues that its attorney did not necessarily mean that the Shutdown Agreement did not address the issue of surplus funds, or that a waiver of rights with respect to such funds was not accomplished by the agreement. It distresses me that such an argument has been presented to this court. In presenting such an argument, Spang has needlessly consumed the time and efforts of this court and of opposing counsel, even though the position taken hardly survived its utterance. I suggest that Spang's present counsel reread the transcript of the 1981 hearing and should, perhaps, consider the duty of candor owed to opposing counsel and the court before making such arguments in the future.

against the employer for a breach of the collective bargaining agreement. Thus, the six-month period does not apply.

Since the LMRA does not provide a statute of limitations, and this is not a case governed by *DelCostello*, the most analogus state limitations period is applied. *Grasty v. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC*, 828 F.2d 123 (3d Cir.), *cert. denied*, 484 U.S. 1042 (1987) (Pennsylvania statute of limitations for breach of contract applied to claims by union members against union for breach of union constitution); *Hotel Employees and Restaurant Employees International Union Welfare Fund v. Pub of New Jersey*, 744 F.Supp. 91 (D.N.J. 1990) (New Jersey six-year statute of limitations for contract actions applicable to LMRA action for payment of delinquent pension fund contributions). Plaintiffs assert that the most closely analogous state statute of limitations is that for breach of contract, 42 Pa.C.S. § 5525, which is four years from the time that a claimant first knows that the breach occurred.

In *Gluck v. Unisys Corp.*, 960 F.2d 1181 (3d Cir. 1992), the court adopted Pennsylvania's limitations period for breach of contract for use with respect to ERISA claims for future benefits. The *Gluck* court distinguished earlier decisions which found that ERISA and LMRA claims for payment of delinquent employer contributions were governed by the three-year limitations period set forth in Pennsylvania's Wage Payment and Collection Law. *Id., citing Vernau v. Vic's Market Inc.*, 896 F.2d 43, 45 (3d Cir. 1990). The analogy between delinquent payments and

"wages" relied upon in *Vernau* was found to be "inoperable when ERISA claims are based upon statutory violations, plan interpretation and future benefits." *Gluck*, at 1181. The *Vernau* analogy to "wages" also fails here, since the contract provision relied upon does not set forth a specific benefit to be paid, but instead provides that contributions will not, under any circumstances, revert to Spang. The claim that Spang breached this provision of the Pension Agreements most closely resembles a claim for breach of contract, and is governed by Pennsylvania's four-year statute of limitations, which begins to run "when a claimant first knows that the benefit has been infringed or removed." *Gluck*, at 1181.

The court must still determine, however, when the plaintiffs first became aware of the breach of contract. Spang argues that any statute of limitations must run from the time of the November, 1981 amendment of the Plan. Plaintiffs have presented uncontested evidence, however, that Spang never informed any of the Plan participants that the amendment had been made, or of its import.[6] Further, the amendment pursuant to which Spang actually took the surplus funds was adopted in 1988, and Plan participants were notified of that amendment in June, 1988, when Spang informed them that the termination of the Plan would have no effect on their

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[6] Spang contends that it informed the Union in September, 1981, that it intended to amend the Plan to provide for reversion of surplus funds. Knowledge of intent to make changes is not equivalent to knowledge of the actual amendment, particularly since no amendment was made until, at the earliest, November, 1981, and the amendment relied upon by Spang was not made until 1988.

pension benefits (i.e., that there would not be an increase due to the distribution of any surplus funds). Therefore, the earliest that the statute of limitations could begin to run in this case is June, 1988, since that is when the participants were first informed of an actual amendment which purported to vest in Spang a right to reversion of excess funds. The plaintiffs' LMRA claims, having been filed within four years of June, 1988, are, therefore, timely.

Spang argues that the Supreme Court has determined the issue of when a cause of action accrues under federal labor law based upon the amendment of a pension plan. Spang relies upon *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which was a case involving the limitations period set forth in § 706(e) of Title VII. The court was interpreting the specific statutory language in question, and did not, as suggested by Spang, purport to decide the issue of accrual of claims in all labor cases. Hence, *Gluck* is controlling, and it is not inconsistent with *Lorance*.[7]

ERISA BENEFITS CLAIM

Spang also asserts that the second count in each of the complaints filed, seeking payment of an ERISA benefit in the form of the surplus funds, is time-barred. Once

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[7] Spang notes that the Court of Appeals for the Seventh Circuit has interpreted *Lorance* as applying in a situation where an early retirement plan is adopted which is at odds with a collective bargaining agreement. *EEOC v. City Colleges of Chicago*, 944 F.2d 339 (7th Cir. 1991). That case is not the law of this circuit, nor is it directly on point.

again, this claim, which is predicated upon allegations that Spang failed to comply with the Plan requirements that it not take any surplus funds, most closely resembles a claim in contract, and is governed by the same four-year statute as the LMRA claim. *Gluck, supra.* The same analysis applies, and Spang's motion for summary judgment with respect to this claim must also be denied.

ERISA FIDUCIARY CLAIM

The last claim raised by plaintiffs is that, by unilaterally amending the Plan to permit reversion of the Plan's surplus funds, Spang has violated its fiduciary duty under ERISA. The applicable statute of limitations in this instance is three years from actual knowledge of the facts and law necessary to inform a plaintiff of the existence of a cause of action, or six years from the adoption of the allegedly improper amendment to the Plan. *See, IUE v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992). Spang asserts that the six-year period is a statute of repose which is unaffected by tolling principles, and that it began to run in November, 1981, when Spang asserts it first amended the Plan to provide for reversion of surplus funds. Plaintiffs reply that tolling principles apply to the six-year statute, and that the amendment pursuant to which the action was taken was adopted in 1988, not 1981.

I find it unnecessary to address the issue of tolling. The amendment of the Plan which is challenged here occurred in 1988. Hence, if the date of the amendment itself is the starting point for limitations purposes, that period did not start until the final amendment of the Plan

in 1988, which was the amendment pursuant to which Spang claimed reversion of the funds. The claim for breach of fiduciary duty survives Spang's motion for summary judgment.[8]

EXHAUSTION OF PLAN REMEDIES

In an alternative to its limitations argument with respect to the ERISA claims, Spang argues that plaintiffs should be required to submit their dispute to the Plan prior to instituting legal proceedings. The same argument was raised in *Delgrosso v. Spang*, 769 F.2d 928 (3d Cir.), *cert. denied*, 476 U.S. 1150 (1985). There, the court held that the dispute was more fundamental than a mere dispute concerning benefits, and that exhaustion was not required when the question was the employer's power to amend the Plan in a manner inconsistent with the Plan Agreement. The same result applies here. Although the issue is, ultimately, whether plaintiffs are entitled to increased benefits, the underlying dispute concerns Spang's authority to amend the Plan. Hence, intra-plan review is not required prior to litigation.

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[8] This result would also apply if the 1981 amendment were con sidered as the start of the six-year period. A material change in the terms of an ERISA plan requires notice to individual participants. 29 U.S.C. § 1022(a)(1). The limitations period is extended "in the case of fraud or concealment" and does not begin to run until "the date of discovery of such breach or violation." 29 U.S.C. § 1113. Spang's admitted failure to provide *any* notice to participants of the actual adoption of the 1981 amendment can be seen as nothing other than concealment. Discovery occurred, at the earliest, in 1988. Again, the action for fiduciary breach is timely.

2. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs assert that they are entitled to summary judgment with respect to their right under the 1978 Pension Agreement, which plaintiffs assert comprises the Pension Plan. Plaintiffs seek a ruling that they are entitled to the surplus funds which existed at the time of the Plan's termination. Plaintiffs' argument is that the Pension Agreement is the sole document which evidences the Plan, and that the provisions forbidding Spang from taking reversion of its contributions along with the direction that all funds in the Plan at termination be distributed in accordance with Article IX of the Agreement entitle plaintiffs to the surplus funds.

Spang counters that the Pension Agreement terminated in 1981, and that its provisions are no longer applicable. It is further asserted that the Plan was amended in 1981 and 1988, and that those provisions govern. Spang's final argument is that, even if the Plan does provide that contributions may not revert to Spang, that prohibition does not apply to contributions made prior to 1963, when the non-reversion provision was first inserted into the Pension Agreements between Spang and its employees.

First, although the Pension Agreement did terminate in 1981, it was, at the time of termination, the sole governing plan document. In fact, the Agreement identifies itself as the Plan. Further, Spang has not produced a copy of any document which existed prior to termination of the Agreement which purports to be the Plan or a portion

thereof.[9] *See, Delgrosso, supra.* Thus, the Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the Agreement's termination.

Spang's attempts to amend the Plan in November, 1981, and June, 1988, must necessarily fail. In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir, 1994), the court found that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document, does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, any proposed amendments in 1981 and 1988 are invalid.

Finally, Spang asserts that the Plan provisions do not apply to contributions made prior to 1963, when the non-reversion provision was adopted. Spang purports to have evidence in the nature of accounting of the Plan which it maintains will establish that the surplus funds in the Plan are traceable to funds contributed by Spang's predecessor prior to 1963. The reversion provision, however, does not differentiate between contributions made by Spang's predecessor prior to 1963, and those made by Spang after 1963. The provision is broadly written and means what it

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[9] The only "Plan" document which Spang produces is a version of the Plan which includes the amendments adopted in November, 1981, which Spang declared to be "effective October 1, 1978." This document did not come into existence until after the 1978 agreements terminated, and the Shutdown Agreement was executed. This is not a "controlling plan document" for purposes of ERISA.

says, "The contributions made by the Company may not under any circumstances revert to the Company." Hence, there is no basis in the Plan for permitting the type of "tracing" proposed by Spang.

It remains, then, to determine if the provisions in question entitle plaintiffs to summary judgment. Indeed, a reading of the Plan establishes that Spang may not retain the surplus. Further, the Plan also provides that, upon termination, the funds in the Plan shall be distributed in accordance with Section IX. That section provides for distribution of plan funds to participants. Although surplus funds are not specifically addressed therein, reading Section IX in concert with the non-reversion provision leads to the inescapable conclusion that the surplus funds must be distributed to the participants in the fund. In any event, reversion to Spang is certainly not permissible. Summary judgment is appropriate in this case.

EXTRA-CONTRACTUAL AND EXEMPLARY RELIEF

Spang is entitled to relief in the nature of striking plaintiffs' claims for extra-contractual and exemplary relief, since neither type of relief is available under the LMRA or ERISA. *Shultz v. Teledyne, Inc.*, 657 F.Supp. 289 (W.D.Pa. 1987).

CLASS CERTIFICATION

Also pending is plaintiffs' motion for class certification at 91-1041. The court has already denied class certification to plaintiffs at the prior actions due to untimely

filing of the motion for certification. Although the motion is timely at 91-1041, it ought to be denied since certification is not necessary. The relief in this case is enforcement of the terms of the Plan. That necessarily includes securing a benefit to the members of the proposed class, which is limited to participants in the Plan. The motion ought to be denied.

MOTION TO DISQUALIFY PLAINTIFFS' ATTORNEYS

Also pending is a motion filed by Spang to disqualify certain of plaintiffs' attorneys. It is asserted that these attorneys are either presently, or were formerly employed by the Union, and that, if they were not representing plaintiffs, plaintiffs would also have filed an action against the Union for bargaining away their rights to the pension surplus pursuant to the Shutdown Agreement. The Union has not been sued by the Plan participants. Further, the Shutdown Agreement does not purport to address the issue of the surplus pension benefits. This motion ought to be denied, since no conflict of interests exists.

3. THE UNION'S MOTION TO DISMISS AT 90-1805

Spang's allegations at this lawsuit are that the Union breached the Shutdown Agreement by sponsoring this lawsuit when the issue of surplus pension funds was addressed by that Agreement. Since this court has already determined that the Shutdown Agreement did not address the issue of surplus funds, Spang cannot

establish a breach of the agreement by the Union, and the Union is entitled to judgment at 90-1805.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion for summary judgment filed by plaintiffs at 88-2548 (Docket #28) be granted; that Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys at 88-2548 (Docket #31) be denied; that Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on Count II of Plaintiffs' Complaint at 88-2548 (Docket #34) be denied; that Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial at 88-2548 (Docket #35) be denied as moot; that Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests for Extracontractual Damages and Class Wide Relief at 88-2548 (Docket #36) be granted; and that Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint at 88-2548 be denied. It is further recommended that the motion to dismiss filed by the Union at 90-1805 (Docket #6) be granted, and that the motion to maintain a class action and for certification of class at 91-1041 (Docket #8) be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules

for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report.

/s/ Kenneth J. Benson
KENNETH J. BENSON
UNITED STATES
MAGISTRATE JUDGE

Dated: June 30, 1994

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos.
SPANG & COMPANY LITIGATION	)	88-2548, 90-1805, 91-1041

MEMORANDUM ORDER

On January 22, 1993, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules of Magistrates.

The Magistrate Judge's Report and Recommendation, filed on June 30, 1994, recommended the following:

(1) Motion for Summary Judgment filed by plaintiffs at Civil Action No. 88-2458 [*sic*] (Document No. 28) be granted;

(2) Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys at Civil Action No. 88-2548 (Document No. 31) be denied;

(3) Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on Count II of Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 34) be denied;

(4) Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial at Civil Action No. 88-2548 (Document No. 35) be denied as moot;

(5) Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests for Extracontractual Damages and Class Wide Relief at Civil Action No. 88-2548 (Document No. 36) be granted;

(6) Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 37) be denied;

(7) Motion to Dismiss filed by the Union at Civil Action No. 90-1805 (Document No. 6) be granted; and

(8) Motion to Maintain a Class Action and for Certification of Class at Civil Action No. 91-1041 (Document No. 8) be denied.

The parties were allowed ten days from the date of service to file objections. Service was made on all counsel by first-class mail on June 30, 1994. The following objections and responses have been filed to the Report and Recommendation of June 30, 1994 (Document No. 104):

(1) Plaintiff Golonka's Objection to the Magistrate's Report and Recommendation (Document No. 106 at Civil Action No. 88-2548) filed on July 15, 1994;

(2) Plaintiff Golonka's Brief in Support of the Objection to the Magistrate's Report and Recommendation (Document No. 107 at Civil Action No. 88-2548) filed on July 19, 1994;

(3) Defendants' Objections to Report and Recommendation of Magistrate Judge Kenneth J. Benson dated June 30, 1994, and Served

by Mail (Document No. 108 at Civil Action No. 88-2548) filed by defendant Spang & Company and defendant Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA Plant on July 20, 1994;

(4) Correction to Defendants' Objections to Report and Recommendation of Magistrate Judge Kenneth J. Benson (Document No. 109 at Civil Action No. 88-2548) filed by defendants Spang & Company and Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Division of Canonsburg, PA Plant on July 20, 1994;

(5) Defendants' Brief in Opposition to Spang's Objections to the Magistrate Judge's Report (Document No. 31 at Civil Action No. 90-1805) filed by defendants United Steelworkers of America, Daniel P. McIntyre, William T. Payne, Karin Feldman and John Does 1-20 on August 1, 1994;

(6) Plaintiff-Participants' August 2, 1994 Brief Responding to Spang's Objections (Document No. 110 at Civil Action No. 88-2548) filed on August 2, 1994;

(7) Plaintiff-Participants' August 2, 1994 Supplement Answering Particular Spang Arguments (Document No. 111 at Civil Action No. 88-2548) filed on August 2, 1994;

(8) Defendants' Brief in Support of Objections to Report and Recommendations of Magistrate Judge Kenneth J. Benson (Document No. 112 at Civil Action No. 88-2548) filed by defendants Spang & Company and The

Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Division of Canonsburg, PA Plant on August 9, 1994;

(9) Appendix to Defendants' Brief in Support of Objections to Report and Recommendation of Magistrate Judge Kenneth J. Benson (Document No. 113 at Civil Action No. 88-2548) filed on August 9, 1994.

After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 6th day of September, 1994,

IT IS HEREBY ORDERED as follows:

(1) Motion for Summary Judgment filed by plaintiffs at Civil Action No. 88-2548 (Document No. 28) is GRANTED;

(2) Defendants' Motion to Disqualify Certain of Plaintiffs' Attorneys at Civil Action No. 88-2548 (Document No. 31) is DENIED;

(3) Defendants' Motion for Judgment on the Pleadings or for Partial Summary Judgment on County [*sic*] II of Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 34) is DENIED;

(4) Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial at Civil Action No. 88-2548 (Document No. 35) is DENIED AS MOOT;

(5) Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment as to Plaintiffs' Requests

for Extracontractual Damages and Class Wide Relief at Civil Action No. 88-2548 (Document No. 36) is GRANTED;

(6) Defendants' Motion for Summary Judgment on Count I of the Plaintiffs' Complaint at Civil Action No. 88-2548 (Document No. 37) is DENIED;

IT IS FURTHER ORDERED that the motion to dismiss filed at Civil Action No. 90-1805 (Document No. 6) is GRANTED for the reasons set forth in the Report and Recommendation of the U.S. Magistrate Judge (Document No. 104) and for the additional reason that under the facts and the law the defendants in Civil Action 90-1805 had neither an express nor implied duty to preserve records and documents for the benefit of Spang and Company as asserted in Count IV of the Complaint.[1]

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[1] In ¶ 9 of the shutdown agreement appended to the Complaint, it is stated:

> Any and all prior negotiations and preliminary drafts and prior versions of this agreement, whether signed or unsigned, between the parties leading up to its execution and not set forth herein shall not be used by either party to construe the terms or affect the validity of this agreement.

Thus, the defendants had no legal duty in that regard. *Cf. Koplin v. Rosel Well Perforators, Inc.*, 734 P. 2d 1177 (Kan. 1987) ("Absent some special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve evidence for another party to aid that other party in some future legal action against a third party."); *Wilson v. Beloit Corp.*, 725 F.Supp. 1056 (W.D. Ark. 1989); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475 (N.D. Cal. 1987); *Spano v. McAvoy*, 589 F. Supp. 423 (N.D. N.Y., 1987); *Caldwell v. City of Philadelphia*, 517 A.2d 1296 (Pa. Super.

IT IS ALSO ORDERED that the motion to maintain a class action and for certification of class at Civil Action No. 91-1041 (Document No. 8) is DENIED.

IT IS FURTHER ORDERED that this case is remanded to the Magistrate Judge for the purpose of determining and recommending specific appropriate relief for the plaintiffs at Civil Action No. 88-2548 and Civil Action No. 91-1041, including but not limited to the appropriate method of distributing the surplus funds in the plan, that is, the funds remaining in the plan as of the date of its termination, together with such other relief that may be appropriate.[2]

The Report and Recommendation of the United States Magistrate Judge dated June 30, 1994 (Document No. 104), except as modified herein, is adopted as the opinion of the Court.

/s/ Donald J. Lee
Donald J. Lee
United States District Judge

cc Honorable Kenneth J. Benson
United States Magistrate Judge

1986). The Court finds that *Liebig v. Consol. Rail Corp.*, No. 91-00609 (C.P., Lebanon Co., PA (1994), relied on by Spang and Company is inapposite on its facts.

[2] The complaints request, *inter alia*, that Spang be removed as fiduciary and an independent administrator to administer the plan be appointed; that Spang account for excess assets removed from the plan; the Court award plaintiffs compensatory damages and exemplary damages; the Court award the plaintiffs attorneys' fees, costs and any other appropriate relief.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos.
SPANG & COMPANY LITIGATION	)	88-2548, 90-1805, 91-1041

ORDER OF COURT

AND NOW, this 22nd day of September, 1994, after telephone conference with Kevin Lucas, Esquire, Alan Lubel, Esquire, Kathryn L. Simpson, Esquire, and Daniel P. McIntyre, Esquire, and after consideration of the Motion to Defer Disposition of Matters Referred to in Memorandum order (Document No. 120 at Civil Action No. 88-2548), it is hereby

ORDERED that said motion (Document No. 120 at Civil Action No. 88-2548) is GRANTED IN PART and DENIED IN PART as follows:

(i) The September 6, 1994, Memorandum Order (Document No. 118 at Civil Action No. 88-2548) is hereby AMENDED as follows:

(A) To the extent it relates to Civil Action No. 90-1805, the first full unnumbered paragraph on Page 4 and Footnote 1 thereto are deleted in entirety, and the order of dismissal granted pursuant thereto in Civil Action No. 90-1805 is hereby vacated;

(B) The reference in ¶ 3 on Page 2 is hereby changed from July 20, 1994, to July 19, 1994;

(ii) The aforesaid motion as it relates to Civil Action Nos. 88-2548 and 91-1041 and the alternative request to enter final judgment pursuant to F.R.C.P. 54(b) is DENIED.

/s/ Donald J. Lee
Donald J. Lee
United States District Judge

cc Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos. 88-2548
SPANG & COMPANY	)	90-1805, 91-1041
LITIGATION	)	JUDGE DONALD J. LEE/
	)	MAGISTRATE
	)	JUDGE BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that this court enter an order directing that Spang be required to repay the entire amount of the reversion it took from the Plan, with interest since the date of Plan termination. It is further recommended that this court certify a class of plaintiffs consisting of all those persons entitled under the Plan to participate in the distribution of excess Plan assets as of the date of termination of the Plan. Finally, it is recommended that this court direct that the Plan be reconstituted, and that the individual class members be paid their share of recovery pursuant to the terms of the Plan.

II. REPORT

At the outset of the report and recommendation issued in this matter in June, 1994, disposing of seven motions, I indicated that this case has become much more complex than it need to have. Indeed, rulings on those

motions, and the dispositive ruling that plaintiffs[1] are entitled to recover from Spang amounts it improperly retained as a reversion of the excess pension assets, have not exhausted every complex issue and nice dispute in this case. After the report and recommendation was adopted by Judge Lee (Docket #118), the parties have filed various pleadings addressing the issue of the nature and form of the remedy in this matter (Docket #127, #128, #131, #132, #133, #134). The issues presently before the court are (1) the nature of the corpus to be refunded by Spang; and (2) the plan participants entitled to share in the recovery.

FACTUAL BACKGROUND

Recitation of the entire history of the pension and the collective bargaining agreements is not necessary at this point. It is important, however, to remember the specific language of the Plan, as evidenced in the Pension Agreements, which was the basis for this court's previous ruling. In each of the Pension Agreements entered into between the Union and Spang from 1963, and including the last agreement in 1978, the following provision appeared:

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[1] Plaintiffs at 88-2548 and 91-1041 are persons entitled to receive benefits under a pension plan (the "Plan") sponsored and administered by the Plan's sole trustee, Spang, for the benefit of employees at Spang's Fort Pitt Bridge and Electric Weld plants in Canonsburg, Pennsylvania. Although Spang is also a "Plaintiff" at a consolidated case, 90-1805, I will hereafter refer to the pensioners as "plaintiffs" for purposes of continuity.

> The contributions made by the Company to the Pension Fund may not under any circumstances revert to the Company. If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX of this Agreement.

(Docket #102, Exhibit 1 at 34). Also relevant are the 1981 and 1988 purported amendments to the Plan, wherein Spang attempted to insert, *inter alia*, the following provision:

> To the extent that there remains a surplus of assets of the trust fund after fully funding all of the above-determined liabilities due to benefits payable under this Plan, such surplus shall be deemed to be due to actuarial error and shall be returned to the Company.

Docket # 99, Exhibit N at 60).

1. THE "CORPUS" FROM WHICH DISTRIBUTION MUST BE MADE

Spang first asserts that the court has not ruled definitively on what portion of the reversion taken by Spang must be disgorged by Spang for redistribution.[2] Spang argues that the court has not specified that the entire reversion must be repaid, and argues that it ought

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[2] Spang, of course, has not conceded the propriety of this court's rulings on the issue of reversion. The arguments presently made by Spang are in the alternative to arguments which it intends to press on appeal from a final judgment in this matter.

to retain all amounts which are attributable not to "contributions" made to the fund, but to interest and other earnings from those contributions. Spang recognizes that the court has ruled that it may not seek reversion of any "contributions" it has made to the fund. The fund, however, is made up entirely of Spang's contributions, plus any interest or other earnings accumulated. Spang asserts that even if it may be required to repay that portion of the reversion which constitutes "contributions" it has made to the pension fund, it may nonetheless retain the interest or other earnings since the non-reversion clause set forth above speaks only to contributions.

The report and recommendation previously entered, and which has been adopted as the opinion of the court, specifically held that the Plan requires that surplus funds be paid to the plaintiffs, and that Spang is not entitled to reversion of such funds. Spang interprets this language, and particularly the use of the term "fund" as injecting some ambiguity into the court's ruling on the plaintiffs' motion for summary judgment. "Fund" is a term of art in the context of pension plans, and has been interpreted in the context of certain pension plans to mean only those monies in a pension plan which are necessary to pay out benefits. I can discern no such ambiguity. This court has ruled that the entire amount of the reversion must be repaid. This necessarily includes any amounts which Spang identifies, or is able to identify, as interest or earnings. In order to dispel any further dispute over this court's ruling, however, I will address Spang's argument in detail. In my view, Spang's argument must be rejected for two reasons.

First, even if, as Spang asserts, there is no absolute bar to its recovering "interest and earnings" as opposed to "contributions," there is no effective provision in the Plan which would permit reversion of any amount to Spang, whether denominated "contribution" or "interest." It must be remembered that the court relied upon alternative bases for requiring Spang to disgorge the reversion, although both findings may generally be couched in terms of Spang having violated the terms of the Plan. The first holding was that Spang had violated the terms of the Plan by unilaterally amending the Plan in 1981 and 1988 to provide for reversion when there was no specific procedure in the Plan providing for such amendments. In this respect, the court relied upon *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), for the proposition that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document, does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, Spang's proposed amendments in 1981 and 1988 were found to be invalid. Absent these amendments, there is no provision in the Plan allowing any type of reversion. Therefore, the question of whether or not Spang could properly amend the Plan to provide for reversion of interest and other earnings need not be reached since Spang did *not* properly amend the Plan to provide for any such reversion. Accordingly, plaintiffs are entitled to repayment of the entire amount of the reversion taken by Spang, since there is no effective amendment to the Plan which provides for reversion of any amount to Spang.

Second, even if Spang had properly amended the Plan to provide for reversion of interest and earnings on contributions, the court's second holding would bar reversion since an amendment providing for reversion of interest and earnings would fail as being at odds with the non-reversion provision of the Plan. Spang asserts that the fact that it may not be entitled to reversion of all of the surplus does not prevent it from seeking reversion of sums which are not identified with particularity in the non-reversion clause of the Plan, i.e., any sums which are not "contributions." Spang relies upon cases which interpret non-reversion clauses that are addressed solely to "funds," a term of art in ERISA cases. For example, in *I.U.E. v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992), the court found that the following non-reversion clause would not prevent an employer from amending the Plan to provide for reversion of surplus:

> "n[o] . . . amendment shall vest in the Company any right, title, or interest in or to the funds held by the Trustee."

Id. at 904. The court found that this did not prevent the employer from amending the plan to provide for reversion of all surplus amounts:

> The limitation on amendments only stated that the company could not amend the Plans to allow it to have an interest in 'funds held by the Trustee.' 'Fund' is defined in section 1.05 of the Plan documents as 'the Trust Fund held pursuant to the Agreement,' while 'the Agreement' is defined as 'the Agreement . . . to be used for funding benefits under the Plan.' Hence, 'funds held by the Trustee' refers only to those funds necessary to for funding benefits under the

> Plans and not to money remaining once all benefits have been paid out. Not only is this definition of 'funds' provided in these particular Plans, but it is also the meaning given to 'funds' by courts in similar contexts. *See, Wilson [v.Bluefield Supply Co.,]* 819 F.2d [457,] at 463-65 [(4th Cir. 1987)]; *[In re C.D.] Moyer [Trust Fund]*, 441 F.Supp. [1128,] at 1131-32 [(E.D.Pa. 1977)].

International Union, 980 F.2d at 906. Thus, in instances where a non-reversion clause refers only to "funds" and where the term "funds" is defined as consisting of only those monies necessary to pay benefits, there is no bar to an employer amending a plan to obtain reversion of any excess monies. Spang argues that a similar analysis applies here. To-wit, since the non-reversion clause only speaks to "contributions" from the employer, any sums which are not contributions must be available for reversion.

There is a real danger in this case that discussion of the issue of reversion will devolve into a semantical debate. Nonetheless, non-reversion clauses have been parsed with some vigor in the case law, and the wording of such clauses defines a company's ability to obtain a reversion. Here, however, there is no language in the Pension Agreement which can be interpreted in a manner consistent with the language addressed in *I.U.E., supra.* Indeed, unlike *I.U.E.*, there is no definition of the term "fund" in the Plan, and, hence, no way in which the court may say that the term "fund" has been defined as encompassing only those assets necessary to pay defined benefits. Second, a finding that the Agreement does not address the issue of interest or earnings from contributions would be contrary to the express terms of the

Agreement. The non-reversion provision does more than simply prevent Spang from ever regaining any contributions it has made to the Fund. It also states that in the event of termination of the Plan, "the funds in the Pension Fund shall be used in the manner provided in Article IX of this Agreement."[3] Article IX provides for increasing benefits to all participants should the prior allocation of funds "no longer be justified" due to "changes in mortality and investment experience, or for other reasons." (Docket #102, Exhibit 1 at 36). The Pension Agreement, which is the sole governing document, specifically provides both that no contribution from Spang may revert to Spang under any circumstances, and that "investment experience" could result in an increase in benefits to participants. In the context of increasing benefits, "investment experience" could only be referring to interest and earnings on contributions which, if larger than anticipated, would be paid out to Plan participants.

Thus, Spang's position, which relies upon the analyses set forth in *I.U.E.*, *Wilson* and *Moyer* is unpersuasive since in those cases the plans at issue defined the term "fund" in a manner which limited the non-reversion provisions in those plans to only those assets necessary to fund defined benefits. That is not the case here. In fact, applying the rationale of those cases here would be inconsistent with express provisions of the Plan which require that, upon termination, all assets of the Plan,

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[3] Again, it must be remembered that there is no limiting definition of "fund" in the Plan which would make this statement applicable to only a certain portion of the assets held by the Plan.

including "excess" assets due to interest and earnings, i.e., assets not necessary to pay defined benefits and which flow from earnings or interest on contributions made to the Plan, be paid to Plan participants. Plaintiffs are entitled to recover the entire amount of the excess assets in the fund at the time of termination.

2. PLAN PARTICIPANTS ENTITLED TO DISTRIBUTION

Having concluded that the entire amount of the reversion must be repaid and distributed, the next issue to be addressed concerns the identity of persons entitled to recovery. The first option, that only the named plaintiffs are entitled to recovery, must be rejected. This court has already noted that "relief in this case is enforcement of the terms of the Plan." (Docket #104 at 18) . Indeed, the court has granted summary judgment on the basis that Spang was required by the terms of the Plan to refrain from taking a reversion of the Fund's assets, and to pay those assets (whether the product of contributions, or earnings from contributions) to the plan participants in accordance with the terms of the Plan. "Although surplus funds are not specifically addressed therein, reading Section IX in concert with the non-reversion provision leads to the inescapable conclusion that the surplus funds must be distributed to the participants in the fund." (Docket #104 at 18).

This court has, then, ruled that *all* Plan participants who would be entitled to distribution of the excess assets upon Plan termination under Article IX are entitled to share in the recovery in this case. Spang asserts that it is

unclear which portion of ERISA this court was relying upon in making this ruling, and that the nature of the relief available is dependent upon the source of the remedy. Specifically, Spang interprets Section 502(a)(2) as providing for plan-wide relief only if a plan still exists, or a class has been certified. *See, Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (Plan participants may sue under § 502(a)(2) in "representational capacity on behalf of the plan as a whole."). Spang also points to *Gruber v. Hubbard Bert Karle Webber, Inc.*, 675 F.Supp. 281 (W.D.Pa. 1987), *vacated on other grounds*, 684 F.Supp. 879 (W.D.Pa. 1988) for the proposition that, where a plan has terminated, relief may be granted directly to a class consisting of the beneficiaries. Thus, it is asserted, since there is neither a plan, nor a certified class, relief may not be granted plan-wide under Section 502(a)(2).

Spang also asserts that relief under § 502(a)(3) is "broad-based" and "collective in nature." Spang, apparently, believes that this section would also be limited to granting of relief either to the plan, or to a class of beneficiaries. There is, however, no case law cited for such a proposition.

Finally, Spang asserts that an action pursuant to § 502(a)(1)(B) is personal in nature and provides no means by which to afford plan-wide relief. I recognize that § 502(a)(1)(B) is written in the singular, i.e., "to recover benefits due to him under the terms of his plan to enforce his rights. . . . ." 29 U.S.C. § 1132(a)(1)(B). The Third Circuit, however, has expressly declined "to rule out the possibility of individual beneficiaries bringing class actions under subsection (a)(1)(B) or to suggest that such class actions might not in fact have much the same

effect as actions brought under subsection (a) (3)." *Livolsi v. Ram Construction Co., Inc.*, 728 F.2d 600, 602 n.5 (3d Cir. 1984).

Therefore, there would appear to be no impediment to granting plan-wide relief in this case, except that the court may be required to certify a class since the plan has been terminated. Plaintiffs, on the other hand, assert that this court may simply order Spang to reconstitute the Plan and pay out benefits thereunder. Plaintiffs also assert that, failing reconstitution of the Plan, the court may impose a constructive trust which would achieve the same result. *See, ACTWU v. Murdock*, 861 F.2d 1406, 1413 (9th Cir. 1988) ("There is no doubt that . . . a constructive trust remedy is available under the catchall relief provisions of both ERISA § 409(a) and § 502(a)(3)."). Plaintiffs also note that the intent of the ERISA remedies provisions are to place the plaintiffs in the same position they would have been in had the breach of fiduciary duty not occurred. In this case, that would mean paying to plaintiffs the benefits they would be entitled to, plus interest, had the lawful termination of the Plan in 1988 been accompanied not by an improper reversion, but by Spang paying out the excess Plan assets in accordance with the Article IX of the Plan. Plaintiffs assert that reconstituting the Plan would operate to place them in as near the same position as possible since it would also give plaintiffs the best chance of obtaining the tax benefits of receiving payments from a pension plan. I agree that this last result would be most in keeping with the purposes of ERISA. In order to reach this result, however, I believe that this court must reconsider its prior rulings on class certification.

This court has addressed the issue of class certification twice previously, first determining that the motion was filed too late at Civil Action No. 88-2458 [*sic*], and by finding that certification would not be necessary since any relief would have the effect of securing relief for all participants in the Plan (Docket #104 at 18). Plaintiffs again assert, however, that class certification would be an appropriate and effective means of determining the number and identity of persons entitled to participate in recovery, and would facilitate the granting of relief under § 502 of ERISA. Indeed, the report and recommendation entered with respect to plaintiff's ERISA claims can most easily be read as granting relief under § 502(a)(1)(B). The holding, however, is not inconsistent with a grant of relief under § 502(a)(2), since a failure to pay benefits under a Plan is a violation of a fiduciary duty under ERISA. *Kann v. Keystone Resources, Inc.*, 575 F.Supp.1084 (Pa. 1983). In fact, the court's ruling is also conclusive in this respect, since there has been an express finding that Spang, as administrator of the Plan, failed to pay benefits in accordance with the terms of the Plan. Hence, the court has in effect ruled that there have been violations of both § 502(a)(1)(B) and § 502(a)(2).

The existence of a class would permit plan-wide recovery, in my view, under either §502(a)(1)(B) or § 502(a)(2). Therefore, I respectfully recommend that a class be certified consisting of all those persons who were entitled to share in the excess assets of the Plan at the time that the Plan was terminated in 1988.[4] Although this

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[4] In this respect, it must be remembered that the Plan was legally terminated. The illegality arose when the excess assets

constitutes a reversal of this court's earlier rulings, it is not inconsistent with the intent of the court with respect to the denial of the latter motion to certify a class. In particular, the motion was most recently denied since the court was of the opinion that plan-wide relief would flow from the determination that Spang failed to comply with the provisions of the Plan by taking the reversion. While this may be the case, it has become apparent that the most appropriate fashion in which to effectuate relief in this case is to reconsider the motion to certify the class, and then grant relief under both § 502(a)(1)(B) and § 502(a)(2) in the form of reconstituting the Plan, and directing that the excess assets be distributed thereunder.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that this court enter an order directing that Spang be required to repay the entire amount of the reversion it took from the Plan, with interest since the date of Plan termination.[5] It is further recommended that

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were not distributed to Plan participants pursuant to Article IX of the Plan. Therefore, the operative date concerning entitlement to share in the division of the excess is the date of termination, and the method of computing the division lies within Article IX.

[5] *See, Kay v. Thrift and Profit Sharing Plan*, 780 F.Supp. 1447, 1462 (E.D.Pa. 1991) (courts have awarded prejudgment interest in ERISA cases where beneficiaries have been denied benefits); *Donovan v. Bryans*, 566 F.Supp. 1258, 1265 (E.D.Pa. 1983) (Court has discretion to determine rate of interest to compensate beneficiaries for breach of duty, although generally the rate is simple interest at the legal rate); *United Steelworkers v. Newman-*

this court certify a class of plaintiffs consisting of all those persons entitled under the Plan to participate in the distribution of excess Plan assets as of the date of termination of the Plan. Finally, it is recommended that this court direct that the Plan be reconstituted, and that the individual class members be paid their share of recovery pursuant to the terms of the Plan.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file objections to this report.

/s/ Kenneth J. Benson
KENNETH J. BENSON
UNITED STATES
MAGISTRATE JUDGE

Dated: February 10, 1995

cc: Kathryn L. Simpson, Esquire
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Crosby Steel, 822 F.Supp. 862, at 869 ("Members of the pension class are entitled to recover the supplemental pension benefits that should have been paid to them since March, 1986, plus interest."); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 774 F.Supp. 802, 814 (S.D.N.Y. 1991) ("ERISA grants the court wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries including award of prejudgment interest.").

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	Civil Action Nos. 88-2548
SPANG & COMPANY	)	90-1805, 91-1041
LITIGATION	)	JUDGE DONALD J. LEE/
	)	MAGISTRATE
	)	JUDGE BENSON

MEMORANDUM ORDER

On January 22, 1993, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Local Rule 72.1.3.

A Memorandum Order was entered in this case on various dispositive motions by the parties on January 22, 1993 (Docket #118), and that order was modified on September 22, 1994 (Docket #124). The matter was then returned to the Magistrate Judge for further rulings concerning the appropriate remedy. Plaintiffs filed a statement concerning remedy on October 18, 1994 (Docket #127), and Spang filed a reply on November 2, 1994 (Docket #128). Further memoranda and replies were filed by the parties at the direction of the Magistrate Judge (Docket #131, #132, #133, and #134).

The Magistrate Judge's Report and Recommendation was filed on February 10, 1995, (Docket #137) in which it was recommended:

(1) that Spang be ordered to repay the entire amount of the reversion taken from the Plan, with interest since the date of Plan termination;

(2) that a class be certified consisting of all those persons entitled under the Plan to participate in the distribution of assets as of the date of Plan termination;

(3) that the individual class members be paid their share of recovery pursuant to the terms of the Plan.

The parties were allowed ten days from the date of service to file objections. Service was made on all counsel by first-class mail on February 10, 1995. Objections were filed by plaintiffs on February 27, 1995 (Docket #139) and by Spang on February 28, 1995 (Docket #140). Plaintiffs also filed a response to Spang's objections on March 9, 1995 (Docket #141).

The parties also exchanged letters concerning the import of a recent Supreme Court ruling in *Curtiss-Wright Corp. v. Schoonejongen*, ___U.S. ___, 115 S.Ct. 1223 (1995).

One matter addressed in the objections of the parties needs to be addressed, and that is the nature of the prejudgment interest due to plaintiffs on the recovery from Spang. Plaintiffs assert that interest should be computed by reference to "quasi-public indices that track appreciation, such as the Standard & Poor's 500 Index." Spang counters that the appropriate measure of interest is the statutory rate for post-judgment interest set forth at 28 U.S.C. § 1961.

In arguing in favor of their position, plaintiffs cite to cases such as *Dasler v. E.F. Hutton & Co., Inc.*, 694 F.Supp. 624 (D.Minn. 1988). In *Dasler*, the court addressed a situation where the ERISA fiduciary had engaged in excessive

trading, resulting in losses to the Plan. In measuring damages, the court compared the plan's actual performance with the Standard & Poor's 500. *See also, Martin v. Feiler,* 965 F.2d 660 (8th Cir. 1992) (measuring damages for self-dealing by fiduciary). Here, however, the Plan was properly terminated effective August 31, 1988, but the Plan proceeds were not paid out to participants at termination. Hence, this is not a situation where the court must find a means of measuring the actual damages suffered by the Plan. The amount of damages in this case is a sum certain; the entire amount of the reversion taken by Spang. Where damages are thus quantifiable, however, courts have granted pre-judgment interest in ERISA cases at the rate provided for in 28 U.S.C. § 1961 for post-judgment interest. *Dependahl v. Falstaff Brewing Corp,,* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981); *Kay v. Thrift and Profit Sharing Plan,* 780 F.Supp. 1447 (E.D.Pa. 1991). Therefore, plaintiffs are entitled to damages in an amount equal to the entire amount of the reversion taken by Spang, plus interest, at the rate provided for in 28 U.S.C. § 1961, since the date of Plan termination, August 31, 1988.

After *de novo* review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 30th day of March, 1995;

IT IS HEREBY ORDERED that the Plan be reconstituted, and that Spang pay into the Plan the entire amount of the reversion it took upon Plan termination, plus interest since August 31, 1988.

IT IS FURTHER ORDERED that a class be certified consisting of all persons entitled under the Plan to participate in the distribution of excess Plan assets as of August 31, 1988, and that individual class members be paid their share of recovery pursuant to the terms of the Plan.

The Report and Recommendation of United States Magistrate Judge Kenneth J. Benson, dated February 10, 1995 (Document #137), is adopted as the opinion of the Court.

/s/ Donald J. Lee
DONALD J. LEE
UNITED STATES
DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3218 and 95-3248

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining United Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and others similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA. PLANT

(D.C. Civil No. 91-cv-01041)

SPANG & COMPANY AND THE PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES OF FORT PITT BRIDGE and ELECTRIC WELD DIVISION OF CANONSBURG, PA, PLANT,

Appellants in No. 95-3218

(Amended per the Clerk's order of 8/29/95

JEAN E. BRYTUS; JOHN LAZOR; WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK; ALEX WARCHOLAK, and others similarly situated; JOHN KOTYK; SAM BORIELLE, JR., and others similarly situated

v.

SPANG & COMPANY; UNION NATIONAL BANK; PENSION PLAN, for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Divisions at Canonsburg, PA, Plant;

(D.C. Civil No. 88-cv-02548)

EDWARD J. GOLONKA, and other similarly situated

v.

SPANG & COMPANY; PENSION PLAN FOR FORMER BARGAINING UNIT EMPLOYEES FORT PITT BRIDGE AND ELECTRIC WELD DIVISION AT CANONSBURG, PA, PLANT

(D.C. Civil No. 91-cv-01041)

JEAN E. BRYTUS, JOHN LAZOR, WHEAT GIACOBBE; JOHN STANKO, STEVE KOTYK, ALEX WARCHOLAK and others similarly situated; JOHN KOTYK, SAM BORIELLE and others similarly situated, EDWARD J. GOLONKA, and others similarly situated,

Appellants in No. 95-3248

(Amended Per the Clerk's order of 8/29/95)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-02548)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN, and LAY,* *Circuit Judges*

The petition for rehearing filed by the appellants-cross appellees, Spang & Company and the Pension Plan for Former Bargaining Unit Employees of Fort Pitt Bridge and Electric Weld Division of Canonsburg, Pa. Plant, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Illegible
Circuit Judge

DATED: Mar 5 – 1996

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

No. 95-1960 (2)

FILED
AUG 2 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SPANG & COMPANY, *et al.*,
Petitioners,

v.

JEAN E. BRYTUS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Dated: August 2, 1996

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30 pp

QUESTIONS PRESENTED

Should the Court grant the petition for certiorari where Petitioner Spang failed to raise in the courts below the question it would now have the Court decide, where the Third Circuit affirmed the trial court decision without opinion, and where the trial court decision does not create a conflict among the circuits?

Where the negotiated pension plan document bars any reversion of plan assets to Spang "under any circumstances" and allocates any surplus assets to increase the benefits of the plan participants, did the trial court correctly conclude that Spang's purported amendment of the plan which allowed it to take the surplus assets for itself was void "as being at odds with the non-reversion provision of the Plan"?

Was the trial court decision correct on the alternative grounds that a Shutdown Agreement (which Spang negotiated with a union in 1981) contained an "additional promise" to pay participants the surplus assets upon plan termination?

Was the trial court decision correct on the alternative grounds that, because the Plan contained no amendment procedure, "Spang . . . violated the terms of the Plan by unilaterally amending [it] in 1981 and 1988" to give itself the right to surplus assets?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. Factual Background	5
REASONS FOR DENYING THE PETITION	12
I. INTRODUCTION AND SUMMARY	12
II. HAVING FAILED TO MAKE ITS ARGUMENT BELOW, SPANG CANNOT NOW ADDRESS IT TO THIS COURT	14
III. BEFORE THE COURT COULD ADDRESS THE QUESTION WHICH SPANG POSES, IT WOULD HAVE TO DETERMINE WHETHER THE MAGISTRATE OPINIONS ERRED IN FINDING THAT PARTICIPANTS' CONTRACT RIGHTS TO THE PENSION ASSETS WERE MEANT TO LAST BEYOND EXPIRATION OF THE PENSION AGREEMENT	15
A. The Trial Court Correctly Found That The Pension Agreement Created Vested Rights To Surplus Pension Assets	16
B. The Shutdown Agreement Contains An Additional Promise To Pay Participants The Surplus Assets Upon Plan Termination	21
IV. EMPLOYERS CAN EASILY PROTECT THEMSELVES FROM THE PROSPECT OF HAVING AN "UNAMENDABLE PLAN"	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES Page

Adcox v. Teledyne, Inc., 21 F.3d 1281 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994) 20
Anderson v. Alpha Portland Industries, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) 20
Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 17
Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) 17, 24
Bryant v. International Fruit Products Co., 793 F.2d 118 (6th Cir. 1986) 15, 18, 20
Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 16, 17
Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. 1223 (1995) 4, 12
Delgrosso v. Spang, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), *later proceedings*, 903 F.2d 234 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 428, 112 L.Ed.2d 412 (1990) ..11, 18, 20
Delta Airlines v. August, 450 U.S. 346 (1981) 14
Heussner v. National Gypsum Co., 887 F.2d 672 (6th Cir. 1989) 20
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 16, 17
Keffer v. H. K. Porter Co., 872 F.2d 60 (4th Cir. 1989) 18
Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 12, 16
Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union, 430 U.S. 243 (1977) .. 16, 17
Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) 18
Retail Clerks International v. Lion Dry Goods, Inc., 369 U.S. 17 (1962) 21
Ryan v. Chromalloy, 877 F.2d 598 (7th Cir. 1989) .. 23, 24
Stewart v. KHD Deutz of America Corp., 980 F.2d 698 (11th Cir. 1993) 23, 24
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 16

TABLE OF AUTHORITIES—Continued

	Page
UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)	17, 19, 20
United States v. Mendenhall, 446 U.S. 544 (1980)	14
United Steelworkers v. Newman-Crosby Steel, 822 F. Supp. 862 (D.R.I. 1993)	18
United Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987)	17
Unitis v. JFC Acquisition, 643 F. Supp. 454 (N.D. Ill. 1986)	18
Weimer v. Kurz-Kasch, 773 F.2d 669 (6th Cir. 1985)	18, 19
Youakim v. Miller, 425 U.S. 231 (1976)	14
STATUTES	
Employee Retirement Income Security Act of 1974:	
29 U.S.C. § 1102(b)	2
29 U.S.C. § 1132(a)(1)(b)	2, 10
29 U.S.C. § 1132(a)(3)	2, 10
Labor Management Relations Act:	
29 U.S.C. § 185	1, 10, 16, 21
RULES	
Federal Rules of Civil Procedure:	
Rule 23(e)	8
OTHER AUTHORITIES	
S. Bruce, *Pension Claims: Rights and Obligations* (BNA Books, 2d ed. 1993)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1960

SPANG & COMPANY, *et al.*,
Petitioners,

v.

JEAN E. BRYTUS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition For A Writ Of Certiorari filed in this case.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 402(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102(b), provides in pertinent part:

> Every employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

Section 502(a)(1)(b) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(1)(b) and (a)(3), provides in pertinent part:

> A civil action may be brought—(1) by a participant or beneficiary— . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .
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> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

STATEMENT OF THE CASE

A. Introduction

Petitioner Spang's Statement Of The Case is inaccurate and incomplete in material respects.

Jean Brytus, a widow of a Spang retiree and lead plaintiff for the class of hundreds plan participants in this action, receives a benefit of $25 per month from the pension plan Spang terminated in 1988.[1] At the time

[1] The two Defendants in *Brytus, Kotyk* and *Galonka* are Spang & Company ("Spang") and the Pension Plan Spang administered for its Fort Pitt Bridge and Electric Weld Divisions in Canonsburg, Pa. The Plaintiffs in *Brytus, Kotyk* and *Galonka* are former employees and surviving spouses entitled to benefits from that Pension Plan, and we refer to them as "Participants."

of termination, the plan had almost $7,000,000 in surplus assets. The question litigated below was who had the right to this surplus under the operative language of the governing plan document.

Incredibly, Spang's Petition fails to address the critical contract language which determined the outcome of this case. That language is part of the collectively bargained pension plan document referred to in these proceedings as the "1978 Pension Agreement." In unambiguous terms, it declares that contributions to the Pension Fund "may not *under any circumstances* revert to the Company. *If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX.*" Article IX, in turn, expressly allotted any surplus remaining after plan termination to increase of pension benefits. (Quoted in the trial court's opinion contained as the appendix to the Petition (hereinafter "6/30/94 Decision"), p. 7a(emphasis added)). Thus, if the plan terminated with surplus assets. the monthly benefits of Ms. Brytus and the other participants would increase.

Participants argued below that the phrase "under no circumstances" meant exactly what it said. Thus, Spang was not free to simply shut down the plant, wait until the Pension Agreement expired, and then unilaterally amend or "restate" the plan to take away the Participants' important right to the surplus pension assets and seize those assets for itself. In other words, Participants argued that the right to the pension surplus was contractually vested, and that Spang could not assert any alleged amendment power to abrogate that vested right after contract expiration.

Agreeing with Participants, the trial court held that the pension rights in question survived contract expiration. and the Third Circuit affirmed without opinion. The trial court "relied upon alternate bases . . ." for finding in favor of Participants. Petition, 2/10/95 Decision, p. 39a.

The first basis for the decision—which is the only one discussed in Spang's Petition—"was that Spang had violated the terms of the Plan by unilaterally amending the Plan in 1981 and 1988 to provide for reversion when there was no specific procedure in the Plan providing for such amendments." *Id.* (applying the reasoning of *Curtiss-Wright Corp. v. Schoonejongen,* 115 S. Ct. 1223, 1230-31 (1995), which held that where the plan lacks an amendment procedure, the plan may "be forever unamendable under standard trust law principles").

The second basis for the trial court's holding was that "even if Spang had properly amended the Plan to provide for reversion . . ., [*the*] *amendment . . . would fail as being at odds with the non-reversion provision of the Plan.*" *Id.*, p. 40a (emphasis added). Thus, this second ground for the decision was that the anti-reversion provision forbidding reversion "under any circumstances" created rights which survived contract expiration and precluded any amendment which purported to take away the rights—even if other amendments would have been lawful.

A final basis for the decision was that Spang had entered into a Shutdown Agreement in October, 1981, which contained an "additional promise" to pay Participants the surplus assets upon plan termination. *Id.*, p. 12a.

Spang fails to disclose the second and third grounds on which Participants prevailed. Moreover, Spang totally ignores the Pension Agreement's specific language relating to surplus pension assets, as well as the specific language of the Shutdown Agreement which confirmed Participants' right to those assets. Focussing only upon the first basis for the trial court's decision, Spang attempts to recharacterize the trial court's decision as a novel far-reaching opinion which will have serious adverse consequences for thousands of employers. Spang says that the decision will impact "the broad range of employee benefit plans embodied in collective bargaining agreements,"

rendering these many thousands of plans "unamendable," so that the "amendments adopted by unions and employers in triennial collective bargaining have been invalid ever since ERISA was enacted in 1974, thus casting the terms of the plans into doubt and permitting participants to sue for any benefits that have been reduced or eliminated by those amendments.' Petition, pp. 24-25.

A more honest analysis of this case demonstrates that Spang's characterization is wrong, that this case is *sui generis,* and that the trial court's decision does not create a conflict among the circuits. Carefully-crafted, unambiguous language not commonly found in pension plans mandated that Spang would never be able to amend the plan to allow it to seize the surplus assets. The trial court's decision—affirmed without opinion—simply requires Spang to honor its agreement. Clearly, the trial court's decision will not have the far-reaching consequences described in Spang's near-hysterical predictions.

B. Factual Background

Spang acquired the Cannonsburg, Pa., plant in 1963. In the same year, Spang and the Union representing the plant's employees entered into a Pension Agreement. Several successor Pension Agreements followed, the last of which was the 1978 document which governs the terms of the pension plan.

The operative language of the 1978 Pension Agreement (as well as the predecessor agreements) denies Spang "any right, title, or interest in or to any of the funds in the Pension Fund, except as specifically provided in this Agreement." A. 202.[2] No other provision of the Pension Agreement vests Spang with a right to any of the funds—through "reversion" or otherwise. Indeed, the Plan's only reference to reversion is a clause that forbids it. As noted, this clause (dating back to 1963) states that the "con-

[2] "A. ——" refers to the Joint Appendix in the Third Circuit.

tributions made by the Company to the Pension Fund may not *under any circumstances* revert to the Company." It then states that "If this Pension Plan shall terminate, the funds in the Pension Fund shall be used in the manner provided in Article IX." Petition, p. 7a. Article IX declares the surplus assets must be used to increase Participants' monthly benefts.[3]

The plan participants had a particular reason to seek control over the pension funds through their union's bargaining in 1963. Starting in that year, all funds contributed to the plan were for each hour of their labor, so that these were funds participants might otherwise have enjoyed in weekly paychecks. Significantly, at the time of these 1963 negotiations, the plan was under-funded by more than $1,300,000. A. 694, ¶ 15. As this substantial shortfall affected the Company's marketability, Spang asked the union to release it from its funding obligation. In striking their bargain, the parties agreed to fund the plan by cents-per-hour contributions, and Spang in turn agreed to the critical language promising that "under no circumstances" would it take the contributions, and that instead all surplus assets would be allocated pursuant to the termination article. A. 694; A. 1812, ¶ 2; A. 1814, ¶ 6. Under this arrangement, the employees first committed 15 cents for each of the hours

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[3] Article IX divides participants into two groups at termination. The first, "group a", comprises those already receiving or vested in pensions. A. 203, § 9.1(a). Article IX first allotted funds to paying group (a)'s pension benefits and only then allotted funds to group (b), which included all other participants—i.e., those who, lacking enough service to vest, only had accrued rights. A. 203, § 9.1(b). The allocation scheme also provided what to do if "changes in mortality and investment experience" left excess assets. These were to be used to increase benefits. If that increase produced benefits "above the level of benefits in effect at the date of termination for group (a) [then increases] shall be granted equally and uniformally to all Participants in both groups (a) and (b)." A. 204.

they worked for funding the plan. By 1965, the diversion from employee wages doubled to 30-cents-per-hour. A. 1856, § 7.2. Contributions under the cents-per-hour regime constituted nearly 60% of all post-1963 contributions. A. 536-37.

Spang announced the closing of the Canonsburg plant in September, 1981, and it subsequently laid off all the employees. At the time of the closing, Spang undertook negotiations with the Union over a variety of issues. During those negotiations, Spang disclaimed any liability for certain benefits which the Union strongly felt it owed to the active employees. (E.g., short-term continuation of health benefits, short-term continuation of pension credit). Spang also provoked opposition from the Union when it took the position that it had the right to take any surplus from the pension fund should the pension plan terminate at some future date. Spang showed the Union representative a supposed "restated plan" which Spang had unilaterally drafted and which it "intended" to adopt in the future. That "plan"—which Spang's Board of Directors would "adopt" later in the year without disclosure to either the Participants or the Union—contained a provision granting Spang the right to the surplus assets upon plan termination.

In the meantime, however, and before Spang's "adoption" of the restated plan it had unilaterally drafted, the Union and the participants filed a class action in federal court which raised the surplus assets issue, along with other issues that grew out of the closing. A. 407 (hereinafter "1981 Class Action"). Count II of the complaint in the 1981 Class Action claimed the Pension Agreement allotted surplus assets to the participants. A. 416-18.

The Union and Spang resolved the 1981 Class Action by entering into a Shutdown Agreement. This Shutdown Agreement required Spang to continue all benefits of the

Pension Agreement. In particular, the Shutdown Agreement provided:

> All eligible participants will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements . . .

6/30/94 Decision, Petition, p. 7a. Of course, under "the terminated Pension Agreements," any future plan termination was to result in benefit increases for all Participants if there were surplus assets. Based on this fact, the trial court below found that the Shutdown Agreement amounted to "an *additional promise* to apply the terms of the terminated Pension Agreements, including the language concerning surplus funds." 6/30/94 Decision, Petition, p. 12a (emphasis added).[4]

At the court hearing in October, 1981, on joint motion for dismissal of the 1981 Class Action held pursuant to F.R.C.P. 23(e), the district court specified the showing it would require permitting dismissal of the suit—that "absent class members would not be in any way prejudiced" by a dismissal predicated on the closing agreement. A. 1780. Plaintiffs' counsel spoke first, noting that settlement embodied in the Shutdown Agreement impli-

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[4] The Union agreed to a standard release in the Shutdown Agreement. The release tracks the language of individual releases which active employees signed after the shutdown. It states simply that the *"benefits set forth in this Agreement* shall be in complete discharge of any and all claims . . ., and receipt and acceptance of *such benefits* by an employee shall constitute a complete release. . . ." 6/30/94 Decision, Petition, p. 8a (emphasis added).

While Spang argued in the Courts below that the release relinquished the rights to surplus assets, one of the "benefits set forth in this Agreement"—which served as the *quid pro quo* for the release—was the continuation of all benefits of the "terminated Pension Agreement." The trial court held that one of the benefits of the "terminated Pension Agreement" was the increase in benefits which would result from the surplus assets. 6/30/94 Decision, Petition, pp. 11a-12a).

cated the complaint's four counts in different ways.[5] He said the settlement was a final compromise of the claims in the first and fourth counts, counts seeking fringe benefits and arbitration of disputes. Then he addressed Count II, participants' claim to the surplus. The court transcript shows counsel stating that, with respect to rights *"to any overage in the pension fund,"* the closing agreement *left "the parties where they were prior to the shutdown."* The Company would determine in the future when it was "going to terminate the pension plan, and *then the issue of overage in the pension fund will be one which can be litigated at that point,* if any participant feels that what the company is doing violates the shutdown agreement or the pension agreement as it is incorporated into the shutdown agreement." A. 1781-82 (emphasis added).

Spang's counsel joined the assessment that the Shutdown Agreement did not affect the ERISA count claiming surplus. He, too, differentiated its effects on counts one and four, on the one hand, and two and three, on the other. He said that counts one and four (which did not involve the surplus) were "taken care of by the

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[5] Two of the Complaint's four counts concerned the surplus issue —most directly, the second count, which contested Spang's claim to the pension surplus. That Count recited that "All participants in the Pension Plan will be deprived of an increase in their vested or accrued benefits if the Company takes for itself any additional monies in the Pension Fund . . ." A. 418, ¶ 39. Other counts sought insurance coverages, vacation pay and the like to which some members of the class claimed entitlement. A. 412-16; 420-22.

Spang now claims that "Pursuant to the Shutdown Agreement, the Employer paid over $641,000 in immediate, additional benefits that the employees were not otherwise entitled to, such as severance pay." Petition, p. 5. Participants dispute this point, contending that the amounts paid were for the other preexisting obligations—insurance coverages, vacation pay, etc.—which Spang initially refused to pay when it closed the plant. However, this factual dispute is not material, as the trial court's decision is still correct even if we assume that Spang's version of the facts is true.

shutdown agreement" and release paragraph. By contrast, he said: "Insofar as counts two and three [involving the surplus] are concerned, relating to ERISA, the company has taken the position, which I believe is correct that we cannot ask anyone to waive statutory rights in futuro, and accordingly the agreement to dismiss *without prejudice* was made upon the basis of our understanding of various counts and how they have been disposed of by the settlement agreement." A. 1784 (emphasis added).

Given counsel's harmonious representations, the court found that "the rights of the members of the class would not be adversely affected by the dismissal without prejudice" and approved the dismissal Spang sought in its shutdown agreement. A. 1786.

Despite the unequivocal provisions of the Pension Agreement and Shutdown Agreement, Spang took the surplus for itself and refused to use the surplus to increase benefits when it terminated the plan in 1988. Thus, Jean Brytus and others brought this action to enforce their contract rights and rights under the Plan. The complaint invokes both ERISA, the federal statute governing the rights of participants "to enforce the terms of [a pension] plan" (29 U.S.C. § 1132(a)(3) and (a)(1)(b)), and Section 301 of the LMRA, 29 U.S.C. § 185, the federal statute governing actions for breach of labor contracts.

Spang's principal argument in the Courts below was that the 1981 Shutdown Agreement had "waived" Participants' right to the surplus assets. As noted, the 6/30/94 Decision concluded that—far from releasing this right—the Shutdown Agreement actually contained "an additional promise" by Spang to use the surplus to increase Participants' benefits upon plan termination.[6]

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[6] Alternatively, the 6/30/94 Decision found that the doctrine of judicial estoppel barred Spang from making this "waiver" argu-

Spang also argued that the 1978 Pension Agreement was not in fact the "plan document" which governed the pension plan. Spang argued that two documents from 1950 and 1960 had constituted the governing "plan documents" over the years, and that it was free under these plan documents to "amend" the plan again in 1981 and 1988—granting itself a right to take the surplus. Spang lost on this issue in the courts below, and has now abandoned this argument concerning the documents from 1950 and 1960. Thus, for purposes of this Petition, the 1978 Pension Agreement is the sole governing plan document, and it has no procedure allowing amendment of the plan.

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ment. In a separate action which also involved Petitioner Spang, the Third Circuit explained that the doctrine of judicial estoppel "precludes a party from assuming a position in a legal proceeding that contradicts or is inconsistent with a previously asserted position." *Delgrosso v. Spang*, 903 F.2d 234, 241 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 428, 112 L.Ed.2d 412 (1990). The trial court below found Spang was again estopped, holding:

> Plaintiffs assert that these representations in open court estop Spang from relying upon the Shutdown Agreement as a waiver of plaintiffs' rights under the Pension Agreement. I agree. Spang's attorney made representations to the court in furtherance of Spang's interest in garnering court approval of the settlement of a lawsuit, and in direct response to the court's concern that the Plan's participants not be prejudiced by settlement. Spang now argues that its attorney did not necessarily mean that the Shutdown Agreement did not address the issue of surplus funds, or that a waiver of rights with respect to such funds was not accomplished by the agreement. It distresses me that such an argument has been presented to this court. In presenting such an argument, Spang has needlessly consumed the time and efforts of this court and of opposing counsel, even though the position taken hardly survived its utterance. I suggest that Spang's present counsel reread the transcript of the 1981 hearing and should, perhaps, consider the duty of candor owed to opposing counsel and the court before making such arguments in the future.

6/30/94 Decision, Petition, pp. 12a-13a, note 5.

The trial court emphasized, however, that it was relying "upon alternative bases for requiring Spang to disgorge the reversion." Petition, 2/10/95 Decision, p. 39a. The first "was that Spang had violated the terms of the Plan by unilaterally amending the Plan in 1981 and 1988 to provide for reversion when there was no specific procedure in the Plan [i.e., the 1978 Pension Agreement] providing for such amendments." *Id.* The second was that "even if Spang had properly amended the Plan to provide for reversion . . ., [*the*] *amendment . . . would fail as being at odds with the non-reversion provision of the Plan.*" *Id.*, p. 40a (emphasis added). A final basis for granting judgment to Participants was that the Shutdown Agreement contained an "additional promise" to pay them the pension surplus when and if the plan terminated. Petition, p. 12a.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION AND SUMMARY.

Spang first observes that, under Court precedent interpreting the National Labor Relations Act ("NLRA"), an employer has an absolute right to reduce or terminate "nonvested" benefits at will after a labor agreement has expired and after bargaining to impasse with the union. Petition, p. 12, citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206-08 (1991). Spang then identifies the alleged problem created by the decision below as follows: if an ERISA plan is embodied in a labor contract which has no procedure for amendment (rendering it unamendable according to the reasoning of the *Curtiss-Wright* and the Court below), then the employer is effectively deprived of this federal labor law right to unilaterally change or terminate benefits. Spang's solution to this problem is to have this Court *imply* a procedure for amending the plan in these situations. Spang says that this Court should find such an implied right in the NLRA precedent which

allows employers to terminate nonvested benefits (such as *Litton*):

> [T]he NLRA creates the context of law within which collective bargaining agreements are created, amended and terminated. Conflict between ERISA and the NLRA can be avoided entirely if the "procedure for amending such plan" is understood, in the case of a plan embodied in a collective bargaining agreement, as the regulatory framework of the NLRA.

Petition, p. 21.

There are several reasons why the Court should refuse to decide the question Spang asks it to decide and deny Spang's Petition.

First, in the courts below, Spang never made this argument concerning the alleged problem of the "unamendable plan." Spang's failure to raise the issue in the court below is, by itself, grounds for denying the Petition.

Second, the decisions below consist of magistrate opinions which the District Court and Third Circuit affirmed without opinion, so that the decisions have limited precedential effect. Furthermore, the opinions create no conflict in the Circuits, and simply purport to be following established law.

Third, even if this Court desired to address the question posed by Spang (i.e., whether there should be an implied right to terminate nonvested plan benefits after contract expiration where the collectively bargained plan has no amendment procedure), this case is not a good vehicle for deciding the question. The Court can reach this question only if the right to the surplus assets was in fact a "nonvested" one which was terminable upon the Pension Agreement's expiration. Thus, before reaching the question Spang proposes, the Court would have to consider (1) whether the trial court erred in finding Participants'

right to the surplus pension assets contractually vested under the 1978 Pension Agreement; and (2) whether the trial court erred in finding that the Shutdown Agreement contained an "additional promise" by Spang to pay over the surplus assets to Participants in the same manner as described in "the terminated Pension Agreements."

Fourth, even if the Court were to find that Participants' rights were "nonvested" and that Spang made no promise which endured beyond expiration of the 1978 Pension Agreement, it should still refuse to hear this case since the alleged problem of an "unamendable plan" is neither serious nor widespread. When negotiating plans with unions, employers can and do protect themselves by specifying whether the negotiated benefits are of the type which can be modified or terminated at contract expiration. The employer here chose simply *not* to specify that the rights created by the Pension Agreement were terminable or amendable. The Court should decline Spang's request that it intervene to rescue it from the consequences of its own failure to reserve a power to amend or terminate.

II. HAVING FAILED TO MAKE ITS ARGUMENT BELOW, SPANG CANNOT NOW ADDRESS IT TO THIS COURT.

The Supreme Court does not consider questions which a petitioner failed to raise in the lower courts. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980).

Participants' counsel have searched Spang's briefs in the courts below, and have not found any argument raising the question Spang would now have this Court decide. Spang simply never raised this argument concerning the alleged problem of the "unamendable plan." Rather, Spang

was content to argue (1) that the "plan" here had actually consisted of other documents which gave it the right to amend and take surplus assets; (2) that the Shutdown Agreement had "released" rights to the surplus; and (3) that Participants' claims were barred by the running of the statute of limitations and the alleged failure to exhaust a claims procedure. Spang should not be permitted to advance a new argument for the first time to this Court.

III. BEFORE THE COURT COULD ADDRESS THE QUESTION WHICH SPANG POSES, IT WOULD HAVE TO DETERMINE WHETHER THE MAGISTRATE OPINIONS ERRED IN FINDING THAT PARTICIPANTS' CONTRACT RIGHTS TO THE PENSION ASSETS WERE MEANT TO LAST BEYOND EXPIRATION OF THE PENSION AGREEMENT.

This case is not a good vehicle to decide the issue Spang proposes. First, we do not have the benefit of any reasoning by the Court of Appeals (or, indeed, by the District Court), since the magistrate opinions were affirmed without opinion. Second, granting review would likely result in consideration of several other issues which involve evidentiary or factual questions, which do not involve legal issues of national significance, and as to which there is no conflict among the circuits. In particular, should the Court grant the petition, it would inevitably have to delve into issues such as the "vesting" of contract rights to pension surplus which turn on the unique facts of each individual case. *E.g., Bryant v. International Fruit Products Co.*, 793 F.2d 118, 123 (6th Cir. 1986) ("Each case of this kind is controlled by the language of the documents creating the particular plan involved.").

A. The Trial Court Correctly Found That The Pension Agreement Created Vested Rights To Surplus Pension Assets.

This is not just an ERISA case. In addition to suing to enforce plan terms under ERISA, Participants brought a separate claim under LMRA § 301, 29 U.S.C. § 185. That statute grants federal courts jurisdiction to hear "suits for violation of contracts between an employer and a labor organization." It also authorizes courts to develop a federal common law of labor contracts. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). Spang admits in its Petition that, under this developing federal common law, certain benefits provided by labor contract can become contractually "vested," so that the employer cannot terminate such benefits even when the agreement expires. Indeed, Spang quotes the observation in *Litton* that "contractual obligations will cease . . . upon termination of the bargaining agreement," but that there are exceptions, and these "[e]xceptions are determined by contract interpretation. *Rights which accrued or vested under the agreement will, as a general rule, survive the termination of the agreement.*" Petition, p. 12 (emphasis added; quoting *Litton,* 501 U.S. at 208.

Litton is but one of a number of this Court's decisions which recognize that negotiated benefits may vest contractually. *E.g., Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 footnote 20 (1971) (observing with respect to retiree health benefits that such *"vested retirement rights may not be altered without the pensioner's consent"*); *Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union,* 430 U.S. 243, 248-49 (1977) (depending on contract's language, severance pay could be an "accrued" or "vested" right earned during the life of the contract but payable even after contract expiration); *John Wiley & Sons v. Livingston,* 376 U.S. 543, 555 (1964) (same).

There are no "magic words" which are necessary to create "vested" rights which survive contract expiration. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (rejecting "the extreme position . . . that the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires"). Usual rules of contract construction apply, and if a benefit is in essence "deferred compensation" earned during the agreement but payable at a later date, courts will be more inclined to find the benefit "vested."

UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), is but one of many cases which apply these principles. The labor agreement in *Yard-Man* contained the simple promise that the Company "will provide insurance" for retirees. *Id.* at 1480. On summary judgment, the Sixth Circuit found the insurance benefits vested. 716 F.2d at 1479-80 (citing *John Wiley, Nolde Bros.*, and *Pittsburgh Plate Glass Co.*). *Yard-Man* utilized common law rules of contract construction,[7] but it also observed that retiree benefits "are typically understood as a form of delayed compensation or reward for past services." It therefore applied an "inference" that such benefits are vested. See also *United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987) (Breyer, J., recognizing that simple contractual promise to provide retiree welfare benefits could

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[7] Three specific examples of such rules *Yard-Man* cites are: (1) a court should interpret each contract provision as part of the integrated whole "so that all of the provisions, if possible, will be given effect." *Id.* at 1479-80; (2) the "agreement's terms must be construed so as to render none nugatory and avoid illusory promises. [citation]" *Id.* at 1480; (see also *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1296 (6th Cir. 1991)), (3) a non-specific general clause (such as a general duration clause of a labor contract) cannot "take precedence" over a more specific clause (such as one promising benefits during retirement). *Id.* at 1483.

be seen as a commitment to pay the benefits "even after the particular collective bargaining agreement expires").[8]

Courts have used such reasoning in finding rights to surplus pension assets contractually vested. Thus, in *Delgrosso v. Spang & Co.*, 769 F.2d 928, 935, 938 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), the same employer now filing this Petition attempted to seize surplus assets under a different collectively bargained Pension Agreement covering different plants. The Third Circuit interpreted an anti-reversion clause identical to that here as being without "the slightest ambiguity" in prohibiting Spang from taking for itself "those monies which it was contractually required to pay into the Fund as *deferred compensation* for its employees." Similarly, in *Bryant v. International Fruit Producers Co.*, 793 F.2d 118, 123 (6th Cir. 1986), the plan allowed reversion of assets "in no event and under no circumstances." The Sixth Circuit concluded: "this language in itself precludes an amendment that would allow money once contributed to be reclaimed." See also *Unitis v. JFC Acquisition*, 643 F. Supp. 454, 459-60 (N.D. Ill. 1986) (where plan stated that "no part of the Trust Fund shall ever revert or be repaid to the Company," the Company could not later amend plan to give it a right to reversion).[9]

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[8] See also *Keffer v. H. K. Porter Co.*, 872 F.2d 60 at 64 (4th Cir. 1989) (recognizing the "far-reaching understanding of the context in which retiree benefits arise: [they] are typically understood as a form of delayed compensation or reward for past services [which would not] be left to the contingencies of future negotiations"); *Weimer v. Kurz-Kasch*, 773 F.2d 669 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); *United Steelworkers v. Newman-Crosby Steel*, 822 F. Supp. 862, 866 (D.R.I. 1993) ("Retiree benefits are generally considered to be 'status' benefits that are expected to continue as long as the employee is retired.").

[9] In light of these authorities, Spang is plainly wrong in suggesting that any interest in pension surplus is *per se* "nonvested." Petition, p. 16, note 10. Such right may be contingent, in that

The operative language here states that "contributions made by the Company to the Pension Fund may not *under any circumstances* revert to the Company" and that "if this plan shall terminate" the surplus is to be used to increase benefits. This obligation to pay over the surplus upon plan termination is *not* limited to the term of the parties' three-year agreement. Indeed, if it were interpreted as so limited, the benefit would be wholly illusory, since all Spang would have to do to deprive Participants of the important benefit would be to wait until contract expiration and eliminate it.

Given the language of the Pension Agreement and applying the foregoing authorities (e.g., *Yard-Man*, which holds that an "agreement's terms must be construed so as to render none nugatory and avoid illusory promises," 716 F.2d at 1480), Participants' right to surplus assets was "vested." The benefit was meant to survive contract expiration and amendments purporting to eliminate it are void. Thus, the trial court correctly held that "even if Spang had properly amended the Plan to provide for reversion . . ., [the] amendment . . . would fail as being at odds with the non-reversion provision of the Plan." *Id.*, p. 40a. This language in the decision below, while not containing the word "vested," shows that the trial

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it is not payable unless and until the plan terminates and it is ascertained that a surplus does exist. However, if these contingencies are met (and assuming the contract language is interpreted as creating a right which survives contract expiration), then the right to the benefit is absolute and nonforfeitable. That a vested benefit can be subject to contingencies is by no means a novel proposition. Even a deferred vested pension, statutorily vested and "nonforfeitable" once the employee satisfies five years of service, is subject to the contingency that the employee actually live past normal retirement age. S. Bruce, *Pension Claims: Rights and Obligations* 241-42 (BNA Books, 2d ed. (1993) (citing relevant statutory provisions). *Cf.*, *Weimer v. Kurz-Kasch*, 773 F.2d 669, 676 (6th Cir. 1985) (finding retiree health benefit "vested" even though it was contingent on participant "remain[ing] retired and unemployed").

court concluded that the non-reversion clause had created a right which had become contractually "vested." [10]

Spang also suggests that Participants conceded below that the pension rights in question here were not contractually "vested." (See Petition, pp. 15-16 and notes 10 & 11: "Respondents admitted on brief that their claim to the surplus is not even a claim for a 'benefit,' much less an accrued or vested pension benefit protected by ERISA . . ."). Far from conceding this question, Participants argued repeatedly that the right to pension surplus was vested by contract. Thus, Participants stated pp. 3-4 of their October 20, 1989 Reply Brief: "Participants' rights to these pension monies were *not* terminable at Spang's whim upon the Pension Agreements' expiration date . . .,' citing "traditional judicial doctrines of 'vested rights' and 'deferred compensation,' which apply with particular force when retirement benefits are at stake . . ." [quoting *Bryant*, *Delgrosso*, and *Yard-Man*]. Participants later stated in the same brief that precedent had held that "the rights to pension assets were akin to 'deferred compensation.' . . . In addition, case law holds that such rights obviously survive contract expiration." *Id.*, pp. 12-14.

Spang cites three cases in support of its argument that the benefits in question here are not "vested." *Anderson v. Alpha Portland Industries*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989); *Adcox v. Teledyne, Inc.*, 21 F.3d 1281 (6th Cir.), *cert. denied*, 115 S.Ct. 193 (1994); *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989). None of those cases, however, dealt with contract language—such as that here and that discussed in *Nolde Bros.*, *Delgrosso*, and *Yard-Man*—which created rights surviving contract expiration. The

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[10] Thus, Spang errs in contending that the trial court did not find the right to surplus assets to be "accrued or vested." Petition, p. 16.

cases Spang cites are therefore distinguishable, and the decision below does not create a conflict among the circuits.

B. The Shutdown Agreement Contains An Additional Promise To Pay Participants The Surplus Assets Upon Plan Termination.

Participants' contract rights enforceable under LMRA § 301 are not limited to those stemming from the 1978 Pension Agreement. Rather, Participants can—and have—sued under that statute to enforce rights emanating from the October, 1981 Shutdown Agreement. See *Retail Clerks International v. Lion Dry Goods, Inc.*, 369 U.S. 17, 24-27 (1962) (the word "contracts" in statute refers not simply to typical three-year collective bargaining agreements, but rather includes all contracts, such as strike settlement agreements).

As the trial court found, the Shutdown Agreement's reaffirmation that Participants would receive all the benefits of the terminated Pension Agreement amounts to an "additional promise" to pay participants the surplus assets upon plan termination. This promise cannot be reasonably construed as being subject to an "implied right" to amend the plan to allow Spang to take the surplus.

Obviously, if this Court were to agree with the trial court's interpretation of the Shutdown Agreement, then it would not reach the question proposed in Spang's Petition (i.e., whether there should be an implied right to terminate nonvested plan benefits after contract expiration where the collectively bargained plan has no amendment procedure). This is because there has never been a "contract expiration" with respect to promise made in the Shutdown Agreement.

Apparently aware of this problem, Spang suggests that the Shutdown Agreement had nothing to do with Participants' victory below: "[Participants'] motion for sum-

mary judgment was based solely on the 1978 Pension Agreement. No claim was made with regard to the Shutdown Agreement." Petition, p. 7 note 5.

This is yet another false assertion by Spang. In their brief as to the summary judgment motion, Participants stated:

> But regardless of whether or not the Pension Agreements themselves contemplate continuation of these important rights after contract expiration, the 1981 Shutdown Agreement makes clear that these rights do indeed survive. That Shutdown Agreement (Exh. 4 to Motion For Summary Judgment) provides: "All eligible participants will receive the pension benefits to which they are entitled as described in the terminated Pension Agreements." Exh. 4, p. 3. Of course, under "the terminated Pension Agreements," any future plan termination must result in benefit increases for all Participants if there are surplus assets.

October 20, 1989 Reply Brief, pp. 3-4. See also Participants' December 17, 1991 supplemental letter brief, A. 1543-44.

Spang's own allegations in a legal malpractice complaint it recently filed against its attorneys who handled the 1981 Class Action also belie its assertion that the Shutdown Agreement did not serve as an alternative basis for Participants' victory below. In that malpractice action, Spang states that Participants in *Brytus* contended "that the shutdown agreement by its own terms, provided that any surplus pension assets which might exist on plan termination was [sic] required to be distributed as benefits to the Plan participants." Complaint in *Spang & Company v. Reed, Smith, Shaw & McClay,* No. GD96-8964, p. 12 ¶ 54. In the very next paragraph of the malpractice complaint, Spang states that the trial court accepted this contention as one of the alternative bases "in ruling

on the motion for summary judgment filed by the plaintiffs in [*Brytus*].". *Id.*, ¶ 55.

IV. EMPLOYERS CAN EASILY PROTECT THEMSELVES FROM THE PROSPECT OF HAVING AN "UNAMENDABLE PLAN."

Even if this were a case which squarely presented the alleged problem of the "unamendable plan" (which Spang says results from the decision below), the Court should still deny the Petition. This alleged problem simply does not warrant expending this Court's scarce resources. This is because, when negotiating benefit plans with unions, employers can and do protect themselves by specifying whether the benefits are of the type which can be modified or terminated at contract expiration.

Thus, in *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698 (11th 1993), the language contained in the signed labor agreement stated: "Upon the expiration or termination of this Agreement, the Company shall have the right to continue the Plans covered herein or to amend, modify, suspend or discontinue the Plans." *Id.* at 701.[11] Similarly, in *Ryan v. Chromalloy*, 877 F.2d 598, 600-01 (7th Cir. 1989), the documents governing the plan covering union employees had for many years included language specifying that "the Plan Administrator reserves the right to amend, modify or terminate this Plan at any time." In light of this language, the court concluded that the employer had lawfully terminated retiree welfare benefits after it sold the plant where the retirees had worked.

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[11] While this language indisputably gave the employer the right to discontinue active employee benefits upon contract expiration, the Eleventh Circuit found an ambiguity with respect to retiree benefits, since other parts of contract suggested retiree benefits were "for life," and since the clause could be seen as applying only to future retirees. *Id.* at 703.

In contrast to the employers in the *Stewart* and *Ryan* cases, the employer here failed to gain language specifying that the rights created by the Pension Agreement were terminable or amendable. The Court should decline Spang's request that it intervene to rescue it from the consequences of its own failure to reserve a right to amend. As Judge Posner stated in an *en banc* decision concerning retiree health beenfits:

> Employers adamant against assuming perpetual obligations can eliminate all doubt by insisting on a clause that makes any entitlement to health benefits granted by the agreement expire on the date the agreement expires.
>
> . . . [Employers] certainly don't have to grant such benefits *in perpetuo*. If they did so in the past, not anticipating the recent rise in health costs, they should not expect the courts to bail them out by undoing the contractually determined allocation of risk on the question. Courts do not sit to relieve contract parties of their improvident commitments, except within the limited dispensation conferred by the doctrine of impossibility, not here invoked.

Bidlack, supra, 993 F.2d at 609.

CONCLUSION

The Court should deny Spang's Petition for Certiorari.

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In The

Supreme Court of the United States

October Term, 1995

SPANG & COMPANY, *ET AL.*,

Petitioners,

v.

JEAN E. BRYTUS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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TABLE OF AUTHORITIES

Page

CASES

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) 4

Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. 1223 (1995) 3

Orr v. Orr, 440 U.S. 268 (1979) 1

United States v. Mendenhall, 446 U.S. 544 (1980) 1

Youakim v. Miller, 425 U.S. 231 (1976) 1

STATUTES

ERISA sec. 514(d), 29 U.S.C. § 1144(d) 7

REPLY BRIEF IN SUPPORT OF PETITION

1. Respondents argue that this Court should not decide the question presented because petitioner did not raise it in the courts below, citing *Youakim v. Miller*, 425 U.S. 231 (1976), and *United States v. Mendenhall*, 446 U.S. 544 (1980). (Respondents' Brief in Opposition at 14-15) That argument is wrong because the question presented was actually considered and decided by the court below.

The cases cited by respondents stand for the proposition that, ordinarily, this Court will not decide a question that was not *decided* by the court below because it was not raised in the court below. Where the court below has *actually considered and decided the question*, however, this Court has long held that it is irrelevant how or when the question was raised:

> This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

Orr v. Orr, 440 U.S. 268, 274-275 (1979) (citations omitted).

In this case, the court below squarely considered and decided the question presented. The grant of summary judgment to respondents (which is the subject of the petition in this case) occupies a discrete section of the Opinion which is entirely focused on the question presented. (Pet. at 19a-21a) First the Opinion concludes that the collectively bargained pension agreements survived

their termination because they represented the "plan document":

> First, although the [1978] Pension Agreement did terminate in 1981, it was, at the time of termination, the sole governing plan document . . . Thus, the [1978 Pension] Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the [1978 Pension] Agreement's termination.

(Pet. at 19a-20a) Then the Opinion concludes that the plan embodied in those expired collective bargaining agreements is unamendable:

> Spang's attempts to amend the Plan in November, 1981 [to reinstate the provision for reversion of surplus assets to the Employer], and June, 1988, must necessarily fail. In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), the court found that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document [*i.e.*, the 1978 Pension Agreements], does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, any proposed amendments in 1981 and 1988 are invalid.

(Pet. at 20a)

Thus, the petition presents the very question considered and decided below, namely, whether an employee benefit plan which is embodied in a collective bargaining

agreement that does not provide for amendment is effectively unamendable after the collective bargaining agreement expires, under *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995). Accordingly, it is appropriately presented for this Court's review.

2. Respondents argue that the Court cannot decide the question presented without delving into "issues such as the 'vesting' of contract rights to pension surplus which turn on unique facts of each individual case." (Respondents' Brief in Opposition at 15) They argue that the decision below is premised on the alternative ground that they had contractually vested rights to the pension surplus, either under the 1978 Pension Agreements or under the Shutdown Agreement. (Respondents' Brief in Opposition at 15-23)

To dispose of that argument, it is necessary only to read the Opinion. In granting summary judgment to respondents, the Opinion says nothing about contractually vested rights under either the 1978 Pension Agreements or the Shutdown Agreement. (Pet. at 19a-21a) On the contrary, it recites that the motion is presented only under the 1978 Pension Agreements, not the Shutdown Agreement (Pet at 19a), and then proceeds to grant summary judgment to respondents based solely on the question of whether the pension plan embodied in the 1978 Pension Agreements can be amended after those agreements terminate. (Pet. at 20a)

Despite the protestations of respondents at this stage, and their new-found interest in a claim of contractually vested rights, it is easy to understand why the Opinion does not address any such question. As noted in the

petition, respondents' motion for summary judgment, by its terms, was premised on the 1978 Pension Agreements alone; it never mentioned the Shutdown Agreement. Moreover, respondents admitted on brief that they had no right to the surplus even under the 1978 Pension Agreements, which terminated in September 1981: "No participant had a right to the surplus increment in 1981." (Plaintiff-Participants' Response to Written Objections to United States Magistrate Judge's Report at 15)

Not only did respondents expressly disavow any claim of contractually vested rights, at oral argument in the Third Circuit they conceded the proposition that an inchoate interest in pension surplus under a pension agreement was *not* a contractually vested right (as set forth in the petition). After counsel for respondents brought up *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), which holds that a union has no authority to bargain away contractually vested rights of retirees, this exchange occurred, in which counsel readily conceded that an inchoate interest in pension surplus *could* be bargained away:

> COURT: Suppose there was, as a matter of a collective bargaining agreement, a provision that there be a pension plan and that the plan provide that the company could not obtain a reversion of excess contributions . . . and subsequently people did retire. And then, in further collective bargaining negotiations, the union and the company made an agreement that excess pension contributions could be reverted to the company . . . and the company then amended the plan in conformity with the second collective bargaining agreement. This would

> affect the benefits, presumably, of retirees, who might have been in the position, you know, to get a surplus. Could this be done?
>
> COUNSEL: I would think that, on a looking forward basis, a union could make an agreement to change reversion language, yes.
>
> COURT: But wouldn't that affect –
>
> COUNSEL: Oh, and that would affect at termination what people otherwise might have gotten. But I think the distinction –
>
> COURT: But it would also terminate people who had already retired and would not, you know, would not be represented by the union.
>
> COUNSEL: Right.

(Audio tape of oral argument, January 29, 1996) Given respondents' concessions, it is not surprising that the decision below does not address any issue of contractually vested rights.[1]

Accordingly, the Opinion delivers up the question presented in pure form, unmixed with any alternative claims. Of course, if the Court grants *certiorari* and reverses and remands the decision below, then respondents will be privileged to assert to the court below whatever alternative claims have not been waived. But

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[1] Tellingly, when respondents launched the lead case (*Brytus*), in which the retiree had died and was survived by his widow, the widow brought the case in her own right as a beneficiary under a pension plan. If respondents had been seeking to enforce a contractually vested right of the deceased retiree under the terminated collective bargaining agreements, the suit would have been brought by his estate.

the possibility that respondents may, on remand, offer alternative claims to sustain their summary judgment – arguments not yet considered or decided by the court below – does not stand in the way of consideration of the one important federal question that *was* actually considered and decided below.[2]

3. Respondents argue, finally, that the question presented is not important because employers can protect themselves against "unamendable plans" by negotiating amendment provisions in collective bargaining agreements. (Respondents' Brief in Opposition at 23-24) It is obviously of vital importance to employers, however, if they must now seek permission from their unions under ERISA to do that which Congress has authorized them to do unilaterally under the NLRA.

Whether employers could negotiate arrangements that would protect them against the absurdity of the decision below is not free from doubt, since the unions must always agree. In any event, the opportunity to negotiate over future collective bargaining agreements would offer no solution to previously terminated collective bargaining agreements, which, under the decision below,

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[2] For example, respondents also state, "This is not just an ERISA case. In addition to suing to enforce plan terms under ERISA, Participants brought a separate claim under LMRA § 301, 29 U.S.C. § 185." (Respondents' Brief in Opposition at 16) True enough. But the Opinion makes clear on its face that no such claim was considered or decided. (Pet. at 19a-21a) Indeed, in its subsequent opinion with regard to remedy, the court below specifically observed that its decision on liability was premised entirely on ERISA. (Pet. at 46a)

may haunt an employer in perpetuity. Ultimately, however, the point is that Congress never intended that employers be put in a position where the correct result can only be achieved by negotiation.

As set out in the petition, the decision below quite unnecessarily creates a major conflict between ERISA and the NLRA. It goes on to resolve the conflict by trampling decades of settled law under the NLRA as to an employer's right to alter the terms and conditions of employment after a collective bargaining agreement terminates. In so doing, it violates Congress's express direction that ERISA *not* be construed to alter or impair any other federal law. ERISA sec. 514(d), 29 U.S.C. § 1144(d). The importance of the case lies in giving effect to the express intent of Congress that ERISA and the NLRA peacefully coexist as a matter of law, as explained in the petition, without putting employers all over the country to the risk and uncertainty of private negotiations to achieve the sensible result that Congress believed it had already legislated.

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